This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

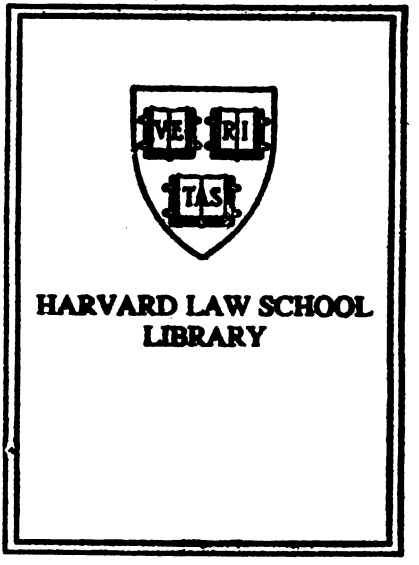
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

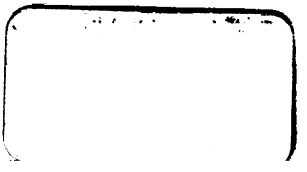
**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

3 2044 078 568 284

Digitized by Google



Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

# COURTS OF APPEALS

OF THE

# STATE OF MISSOURI

---

REPORTED FOR THE

ST. LOUIS COURT OF APPEALS

March 5, 1912.

BY THOMAS E. FRANCIS of the St. Louis Bar.

FOR THE

KANSAS CITY COURT OF APPEALS

April 29, 1912 to June 3, 1912.

BY JOHN M. CLEARY of the Kansas City Bar.

AND FOR THE

SPRINGFIELD COURT OF APPEALS

March 4, 1912 to June 3, 1912.

By LEWIS LUSTER of the Springfield Bar,

OFFICIAL REPORTERS.

---

# VOL. 164.

---

COLUMBIA, MO.
E. W. STEPHENS, PUBLISHER,
1912.

Digitized by Google

Entered according to act of Congress in the year 1912 by

E. W. STEPHENS,

In the office of the Librarian of Congress at Washington, D. C.

OCT 9 1912

Digitized by Google

## JUDGES OF THE
## ST. LOUIS COURT OF APPEALS.

HON. GEORGE D. REYNOLDS, *Presiding Judge.*
HON. ALBERT D. NORTONI, } *Judges.*
HON. HENRY S. CAULFIELD, }
JOSEPH FLORY, *Clerk.*
THOMAS E. FRANCIS, *Reporter.*

## JUDGES OF THE
## KANSAS CITY COURT OF APPEALS.

HON. ELBRIDGE J. BROADDUS, *Presiding Judge.*
HON. JAMES ELLISON, } *Judges.*
HON. JAMES M. JOHNSON, }
L. F. McCOY, *Clerk.*
JOHN M. CLEARY, *Reporter.*

## JUDGES OF THE
## SPRINGFIELD COURT OF APPEALS.

HON. J. P. NIXON, *Presiding Judge.*
HON. ARGUS COX, } *Judges.*
HON. HOWARD GRAY, }
H. H. MITCHELL, *Clerk.*
LEWIS LUSTER, *Reporter.*

Digitized by Google

# CASES REPORTED.

## A.

American Hardwood Lumber Co. v. Dent ..... 442
American Insurance Company of Newark, Patterson v. ..... 157
Anderson, White v. ..... 132
Anderson v. St. Louis & San Francisco R. R. Co. ..... 357
Appleton Mfg. Co., Hess v. ..... 153
Atchison, Topeka & Santa Fe Ry. Co., Zwicky v. ..... 180

## B.

Bank of Webster Groves, Municipal Engineering and Contracting Co. v. ..... 428
Barton, Karp v. ..... 389
Bayless, Hatch v. ..... 216
Beall v. Board of Trade of Kansas City ..... 186
Berkbiegler v. Cape Girardeau & Chester Ry. Co. ..... 441
Bernardnon, General Renting & Investment Co. v. ..... 384
Birron, State v. ..... 212
Board of Trade of Kansas City, Beall v. ..... 186
Brazelle, Leschen v. ..... 415
Brigs et al., Clark Williams Realty Co. v. ..... 104
Brougham, Henenkratt v. ..... 108
Brown, State v. ..... 726
Burress, Miners' Bank v. ..... 690
Bush v. Missouri, Kansas & Texas Ry. Co. ..... 420
Butts v. Gaar-Scott & Co. ..... 307

## C.

Campbell, Administrator, v. Hayden et al. ..... 252
Campbell et al., Thayer-Moore Brokerage Co. v. ..... 8
Cape Girardeau & Chester Ry. Co., Berkbiegler v. ..... 441
Carroll v. Lemmons ..... 655
Center Creek Mining Co. v. Coyne et al. ..... 492
Central Pennsylvania Conference Educational Society of the Methodist Episcopal Church v. La Rue ..... 93
Chinn, State v. ..... 124
City of Columbia v. Samuels ..... 92
City of Fulton v. Craighead ..... 90
City of St. Joseph, Roth, Admr., v. ..... 26
City of Springfield, Hopkins v. ..... 682
Clark Williams Realty Co. v. Briggs et al. ..... 104
Clymer, State ex rel. v. ..... 671
Cole v. Waters ..... 567
Columbia, City of, v. Samuels ..... 92
Covell v. Western Union Telegraph Co. ..... 630
Coyne et al., Center Creek Mining Co. v. ..... 492
Craighead, City of Fulton v. ..... 90
Crider v. Haynes ..... 728

## D.

Davidson v. St. Louis & San Francisco Ry. Co. ..... 701
Dent, American Hardwood Lumber Co. v. ..... 442



Digitized by Google

Detoul v. Yeater ..... 245
Dodd, Hughes & Thurman v. ..... 454
Dudding, Stratton v. ..... 22

E.

Earll, Stevens v. ..... 461
Estate of Shoemaker, Marshall v. ..... 429

F.

Fifty-Third National Bank of Cincinnati v. McCrory et al. .... 144
Fire Association of Philadelphia, Spickard v. ..... 1
Ford v. McClain ..... 174
Fulton, City of, v. Craighead ..... 90
Fults v. Metropolitan Street Railway Co. ..... 101

G.

Gaar-Scott & Co., Butts v. ..... 307
Gabriel v. Metropolitan Street Railway Co. ..... 56
George v. Metropolitan Street Railway Co. ..... 121
General Renting & Investment Co. v. Bernardnon ..... 384
Gilbert et al., State ex rel. v. ..... 139

H.

Hanenkratt v. Brougham ..... 108
Hatch v. Bayless ..... 216
Hayden, Campbell, Administrator, v. ..... 252
Haynes, Crider v. ..... 728
Hedge v. St. Louis & San Francisco Ry. Co. ..... 291
Hegberg, Admr., v. St. Louis & San Francisco Ry. Co. ..... 514
Hess v. Appleton Mfg. Co. ..... 153
Home Telephone Co., Hulse v. ..... 126
Homer, State ex rel. v. ..... 334
Hopkins v. City of Springfield ..... 682
Huggins et al., Walter v. ..... 69
Hughes & Thurman v. Dodd, ..... 454
Hulse v. Home Telephone Co. ..... 126
Humphreys Mercantile Co. v. Walker ..... 208
Hunt, Lutesville Milling Co. v. ..... 358

J.

Jackson, Link v. ..... 195
Jenkins v. Womach ..... 38
Johnson v. St. Louis & San Francisco Ry. Co. ..... 600
Johnson, Schneider v. ..... 639

K.

Karp v. Barton ..... 389
Kearney v. Laird et al. ..... 406
Kellog et al., Ward v. ..... 81
Knights of Father Matthews, State ex rel. Kane v. ..... 361

L.

Laird et al., Kearney v. ..... 406
La Rue, Central Pennsylvania Conference Educational Society of the Methodist Episcopal Church v. ..... 93
Lemmons, Carroll v. ..... 655

Digitized by Google

Lemmons v. Robertson ..... 85
Leschen v. Brazelle ..... 415
Levee District No. 1, Watts v. ..... 263
Link v. Jackson ..... 195
Long, State ex rel. Fitch v. ..... 658
Lutesville Milling Co. v. Hunt ..... 358
Lynn v. St. Louis, Iron Mountain & Southern Ry. Co. ..... 445

M.

Marshall v. Estate of Shoemaker ..... 429
Maupin v. Miller ..... 149
May, Stern & Co., Ross v. ..... 398
Metropolitan Street Railway Co., Fults v. ..... 101
Metropolitan Street Railway Co., Gabriel v. ..... 56
Metropolitan Street Railway Co., George v. ..... 121
Metropolitan Street Railway Co., McDonald v. ..... 111
Metropolitan Street Railway Co., Showen, Admr. v. ..... 41
Miller, Maupin v. ..... 149
Miners' Bank v. Burress ..... 690
Missouri, Kansas & Texas Ry. Co., Bush v. ..... 420
Missouri Pacific Ry. Co., Moore v. ..... 34
Missouri Pacific Ry. Co., Parker v. ..... 31
Moore v. Western Union Telegraph Co. ..... 165
Moore, Admr., v. Missouri Pacific Ry. Co. ..... 34
Moore, State ex rel. Weast v. ..... 649
Moss, State v. ..... 379
Municipal Engineering and Contracting Co. v. Bank of Webster Groves ..... 428
Murphy, State v. ..... 204

Mc.

McClain, Ford v. ..... 174
McCrory et al., Fifty-Third Natl. Bank of Cincinnati v. ..... 144
McDonald v. Metropolitan Street Railway Co. ..... 111

N.

Niagara Fire Ins. Co., Sharp v. ..... 475

O.

Otrich v. St. Louis, Iron Mountain and Southern Ry. Co. .... 444

P.

Paul v. Western Union Telegraph Co. ..... 233
Parker v. Missouri Pacific Ry. Co. ..... 31
Patterson v. American Ins. Co. of Newark ..... 157

R.

Rhea, State v. ..... 666
Ridenour v. Wilcox Mines Co. ..... 576
Robertson, Lemmons v. ..... 85
Ross v. May, Stern & Co. ..... 398
Roth, Administrator, v. City of St. Joseph ..... 26

Digitized by Google

S.

St. Joseph, City of, Roth v. ..... 26
St. Louis, Iron Mountain & Southern Ry. Co., Lynn v. ..... 445
St. Louis, Iron Mountain & Southern Ry. Co., Otrich v. ..... 444
St. Louis & San Francisco Ry. Co. Anderson v. ..... 357
St. Louis & San Francisco Ry. Co., Davidson v. ..... 701
St. Louis & San Francisco Ry. Co., Hedge v. ..... 291
St. Louis & San Francisco Ry. Co., Hegberg v. ..... 514
St. Louis & San Francisco Ry. Co., Johnson v. ..... 600
Samuels, City of Columbia v. ..... 92
Schneider v. Johnson ..... 639
Sebastian, State v. ..... 469
Sharp v. Niagara Fire Ins. Co. ..... 475
Shoemaker, Estate of, Marshall v. ..... 429
Showen, Admr., v. Metropolitan Street Ry. Co. ..... 41
Smart v. Wabash R. R. Co. ..... 61
Smith v. Smith ..... 53
Smith v. Smith ..... 439
Smith, Smith v. ..... 53
Smith, Smith v. ..... 439
Spickard v. Fire Association of Philadelphia ..... 1
Springfield, City of, Hopkins v. ..... 682
State v. Birron ..... 212
State v. Brown ..... 726
State v. Chinn ..... 124
State v. Moss ..... 379
State v. Murphy ..... 204
State v. Rhea ..... 666
State v. Sebastian ..... 469
State ex rel. v. Clymer ..... 671
State ex rel. Fitch v. Long ..... 658
State ex rel. v. Gilbert et al. ..... 139
State ex rel. Granite City and Madison Belt Line R. R. Co. v. Homer ..... 334
State ex rel. Kane v. Knights of Fathew Matthew ..... 361
State ex rel. Weast v. Moore ..... 649
Stevens v. Earll ..... 461
Stratton v. Dudding ..... 22

T.

Thayer-Moore Brokerage Co. v. Campbell et al. ..... 8
Torreyson v. United States Railways Co. of St. Louis ..... 366

U.

United Railways Co. of St. Louis, Torreyson v. ..... 366

W.

Wabash R. R. Co., Smart v. ..... 61
Wabash R. R. Co., Wilder v. ..... 114
Walker, Humphreys Merc. Co. v. ..... 208
Walter v. Huggins et al. ..... 69
Ward v. Kellog et al. ..... 81
Waters, Cole v. ..... 567
Watts v. Levee District No. 1 ..... 263
Western Union Telegraph Co., Covell v. ..... 630
Western Union Telegraph Co., Moore v. ..... 165
Western Union Telegraph Co., Paul v. ..... 233
White, Anderson v. ..... 132

Digitized by Google

Wilcox Mines Co., Ridenour v. ..... 576
Wilder v. Wabash R. R. Co. ..... 114
Womach, Jenkins v. ..... 38

Y.

Yeater, Detoul v. ..... 245

Z.

Zwicky v. Atchison, Topeka & Santa Fe R. R. Co. ..... 180

Digitized by Google

# CASES CITED.

## A.


Adams v. Huggins, 73 Mo. App. 140 ..... 178
Alcorn v. R. R., 108 Mo. 81 ..... 625
Alkire Grocery Co. v. Tagart, 78 Mo. App. 166 ..... 222
American Hardwood Lumber Co. v. Dent, 151 Mo. App. 614 .. 443
Anderson v. R. R., 149 Mo. App. 266 ..... 357
Aultman v. Daggs, 139 Mo. App. 133 ..... 157


## B.


Bailey v. Kansas City, 189 Mo. 1 ..... 547
Baisley v. Baisley, 113 Mo. 544 ..... 652
Bank v. Hammond, 124 Mo. App. 177 ..... 717
Bank v. Kellogg, 52 Mo. App. 583 ..... 645
Bank of Tipton v. Davidson, 40 Mo. App. 421 ..... 13
Barker v. Ry. Co., 91 Mo. 94 ..... 565
Barkley v. Cemetery Assn., 103 Mo. 317 ..... 223
Barnett v. Pepper, 114 Mo. App. 221 ..... 231
Barngrover v. Maack, 46 Mo. App. 407 ..... 21
Barrett v. Western Union Tel. Co., 42 Mo. App. 542 ..... 239
Barry v. R. R., 98 Mo. 62 .....545, 619
Bates v. Sylvester, 205 Mo. 493 ..... 46
Bateson v. Clark, 37 Mo. 34 ..... 565
Baustin v. Young, 152 Mo. 324 ..... 713
Beave v. Transit Co., 212 Mo. 331 ..... 59
Behen v. Transit Co., 186 Mo. 430 ..... 46
Bell v. R. R., 125 Mo. App. 660 ..... 59
Benjamin v. Street Ry. Co., 50 Mo. App. 602 ..... 593
Berkbiegler v. R. R., 152 Mo. App. 543 ..... 441
Binde v. Klinge, 30 Mo. App. 285 ..... 676
Bindbeutal v. Street Ry. Co., 43 Mo. App. 463 ..... 223
Blyston-Spencer v. R. R., 152 Mo. App. 118 ..... 68
Bode v. Firemen's Ins. Co., 103 Mo. App. 289 ..... 486
Bond v. Sanford, 134 Mo. App. 474 ..... 417
Boyd v. R. R., 236 Mo. 54 ..... 54
Boyle v. Clark, 63 Mo. App. 473 ..... 658
Brady v. R. R., 206 Mo. 509 .....545, 624
Bradley v. Spickardsville, 90 Mo. App. 416 ..... 51
Brannock v. R. R., 147 Mo. App. 301 ..... 620
Brinkman v. Gotlenstroeter, 153 Mo. App. 351 ..... 717
Briscoe v. Street Ry. Co., 222 Mo. 104 ..... 114
Brookline Canning & Packing Co. v. Evans, 163 Mo. App. 564.. 645
Brown v. R. R., 89 Mo. App. 192 ..... 425
Brown v. Scruggs, 141 Mo. App. 632 ..... 30
Bruce v. Vogel, 38 Mo. 100 ..... 157
Brudall v. Johnson, 122 Mo. App. 119 ..... 20
Bruner v. Marcum, 50 Mo. 405 ..... 361
Buddenberg v. Transportation Co., 108 Mo. 394 ..... 551
Burress v. Spring, 143 Mo. App. 688 ..... 698
Butler v. Lawson, 72 Mo. 244 ..... 157
Byrd v. Hartman, 70 Mo. App. 57 ..... 50




Digitized by Google

C.

Cadematori v. Gauger, 160 Mo. 352 ..... 506
Cahill Swift & Co. v. McCornish, 74 Mo. App. 609 ..... 106
Caldwell v. Ryan, 210 Mo. 17 ..... 404
Carp v. Ins. Co., 116 Mo. App. 528 ..... 7
Carthage M. & W. L. Co. v. Bauman, 55 Mo. App. 204 ..... 107
Casey v. St. Louis T. Co., 205 Mo. 721 ..... 549
Casey v. St. Louis T. Co., 116 Mo. App. 235 ..... 549
Casey v. St. Louis T. Co., 186 Mo. 229 ..... 689
Castleman v. Castleman, 184 Mo. 432 ..... 352
Champagne v. Hamey, 189 Mo. 726 ..... 714
Childs v. Childs, 11 Mo. App. 395 ..... 55
Chlanda v. Transit Co., 213 Mo. 244 ..... 37
Chrismer v. Telephone Co., 194 Mo. 189 ..... 66
Christian v. Ins. Co., 143 Mo. 460 ..... 202
Christian v. Williams, 111 Mo. 429 ..... 652
Christopher v. Kelley, 91 Mo. App. 93 ..... 107
City of Independence v. Cleveland, 167 Mo. 384 ..... 91
Cobb v. R. R., 149 Mo. 135 ..... 377
Coffey v. Carthage, 186 Mo. 585 ..... 628
Cohn v. The City of Kansas, 108 Mo. 387 ..... 185
Cole v. Cole, 89 Mo. App. 228 ..... 55
Coin v. Lounge Co., 222 Mo. 506 ..... 66
Combs v. Rountree Const. Co., 205 Mo. 367 ..... 592
Connell v. Telegraph Co., 108 Mo. 459 ..... 171
Connor v. Black, 119 Mo. 126 ..... 194
Conway v. Ry., 161 Mo. App. 81 ..... 59
Corby v. Telephone Co., 231 Mo. 417 ..... 129
Corrigan v. Kansas City, 93 Mo. App. 173 ..... 599
Crim v. Crim, 162 Mo. 544 ..... 96
Crassan v. Ins. Co., 133 Mo. App. 594 ..... 3
Cunningham v. The Journal Co., 95 Mo. App. 51 ..... 66

D.

Daggs v. Ins. Co., 136 Mo. 282 ..... 5
Dalton v. Poplar Bluff, 173 Mo. 47 ..... 718
Danforth v. Foster, 158 Mo. App. 94 ..... 507
Davis v. Barada-Ghio R. E. Co., 163 Mo. App. 328 ..... 599
Davis Mill Co. v. Bennett, 39 Mo. App. 460 ..... 283
Dayharsh v. R. R., 103 Mo. 317 ..... 223
Dean v. R. R., 199 Mo. 397 ..... 21
Deierling v. Sloop, 67 Mo. App. 446 ..... 194
Dempsey v. Lawson, 76 Mo. App. 522 ..... 50
Dent v. Traction Co., 145 Mo. App. 61 ..... 114
Detrich v. Ry., 143 Mo. App. 176 ..... 59
Dillon v. Hunt, 82 Mo. 150 ..... 553
Donaldson Bond, Etc. Co. v. Hauck, 213 Mo. 416 ..... 388
Donner v. Ry., 132 Mo. App. 527 ..... 30
Dougherty & Moss Lbr. Co. v. Rothbaum, 156 Mo. App. 215 .... 510
Dudley v. McCluer, 65 Mo. 241 ..... 222
Dulaney v. Ry., 21 Mo. App. 599 ..... 48
Dunn v. Electric Ry. Co., 81 Mo. App. 42 ..... 378
Dyer v. Tyrrell, 142 Mo. App. 467 ..... 717
Eckhard v. St. Louis T. Co., 202 Mo. 345 ..... 540
Eddington v. Telegraph Co., 115 Mo. App. 98 ..... 171
Elliott v. Elliott, 135 Mo. App. 42 ..... 55
Elliott v. Sullivan, 156 Mo. App. 496 ..... 645
Elliott v. Kansas City, 210 Mo. 576 ..... 46
Emery v. Ry. Co., 77 Mo. 339 ..... 17
Eppstein v. R. R., 197 Mo. 720 ..... 376
Estate Co. v. Arnes Co., 110 Mo. App. 406 ..... 17

Digitized by Google

Estes v. Ry., 111 Mo. App. 1 ..... 50
Evans v. R. R., 130 Mo. App. 509 ..... 184
Evans v. R. R., 178 Mo. 508 ..... 540

F.

Farmer v. Board of Trade, 78 Mo. App. 557 ..... 194
Farmers Bank v. Gallagher, 43 Mo. App. 483 ..... 645
Feddeck v. St. Louis Car Co., 125 Mo. App. 24 ..... 333
Ferguson & Wheeler v. Davidson, 147 Mo. 664 ..... 484
First National Bank v. Ward, 124 Mo. 72 ..... 147
Flesh v. Christopher, 11 Mo. App. 483 ..... 17
Flick v. Schenck, 212 Mo. 275 ..... 437
Foate v. Newell, 24 Mo. 400 ..... 101
Ford v. Gray, 131 Mo. App. 240 ..... 383
Foster v. Williams, 144 Mo. App. 227 ..... 507
Francis v. R. R., 127 Mo. 658 ..... 545
Friestatt Milling Co. v. Boggess, 80 Mo. App. 296 ..... 426
Frye v. R. R., 200 Mo. 377 ..... 327
Fuller v. Robinson, 230 Mo. 22 ..... 713
Fullerton v. Fordyce, 144 Mo. 519 ..... 594
Furnish v. R. R., 102 Mo. 438 ..... 687

G.

Gallagher v. Tipton, 133 Mo. App. 557 ..... 30
Gannon v. Laclede Gas Light Co., 45 Mo. 502 ..... 716
Gardner v. Terry, 99 Mo. 523 ..... 513
Garth v. Caldwell, 72 Mo. 622 ..... 727
Gayle v. Missouri Car & Fdry Co., 177 Mo. 427 ..... 377
Gibson v. Chouteau, 7 Mo. App. 1 ..... 654
Gibson v. Mo. Town Mutual Ins. Co., 82 Mo. App. 515 ..... 3
Gilkeson v. R. R., 222 Mo. 173 ..... 553
Glaser v. Rothschild, 221 Mo. 180 ..... 84
Glover v. R. R., 129 Mo. App. 563 ..... 378
Goldman v. Wolff, 6 Mo. App. 492 ..... 21
Gordon v. Bruner, 49 Mo. 570 ..... 17
Gordon v. Burris, 141 Mo. 615 ..... 717
Gordon v. Park, 219 Mo. 600 ..... 202
Gordon v. Peltzer, 56 Mo. App. 599 ..... 83
Gragg v. Ins. Co., 132 Mo. App. 408 ..... 3
Grant v. Telegraph Co., 154 Mo. App. 279 ..... 171, 239
Groomes v. Mullett, 133 Mo. App. 477 ..... 506
Grout v. Ry., 125 Mo. App. 552 ..... 120

H.

Hall v. R. R., 124 Mo. App. 664 ..... 23
Hamilton v. R. R., 114 Mo. App. 504 ..... 58
Hanna v. Ins. Co., 190 Mo. App. 152 ..... 3, 4
Hannibal & St. Joseph R. Co. v. State Board, 64 Mo. 294 ..... 143
Hansford v. Hansford, 34 Mo. App. 262 ..... 55
Hanson v. Meal, 215 Mo. 278 ..... 565
Hardy v. Graham, 63 Mo. App. 40 ..... 511
Harrington v. City of Sedalia, 98 Mo. 583 ..... 60
Hartzler v. Street Ry. Co., 218 Mo. 562 ..... 238
Hauser v. Hoffman, 32 Mo. 334 ..... 513
Havens v. Fire Ins. Co., 123 Mo. 1 ..... 485
Hawver v. Springfield Traction Co., 154 Mo. App. 452 ..... 686
Hays v. Columbia, 159 Mo. App. 431 ..... 30
Haysler v. Owens, 61 Mo. 272 ..... 74
Heberling v. Warrensburg, 204 Mo. 604 ..... 628
Hedrick v. St. Joseph, 138 Mo. App. 396 ..... 29
Heimberger v. Harrison, 83 Mo. App. 544 ..... 106

Digitized by Google

Herdt v. Koenig, 137 Mo. App. 589 ..... 396, 397
Herndon v. Lewis, 175 Mo. 116 ..... 147
Hewitt v. Price, 204 Mo. 31 ..... 352
Hewitt v. Steele, 118 Mo. 463 ..... 147
Hicks v. Ry. Co., 124 Mo. 115 ..... 594
Hilburn v. Insurance Co., 140 Mo. App. 355 ..... 4
Hill v. Coombs, 92 Mo. App. 242 ..... 178
Hirsch v. Bread Co., 150 Mo. App. 162 ..... 152
Hirt v. Hohn, 61 Mo. 496 ..... 75
Hoffman v. Walton, 36 Mo. 613 ..... 510
Holmes v. Farris, 97 Mo. App. 305 ..... 224
Holmes v. R. R., 190 Mo. 98 ..... 397
Holton v. Cochran, 208 Mo. 314 ..... 593
Holtzen v. R. R., 159 Mo. App. 370 ..... 38
Hoover v. Ins. Co., 93 Mo. App. 111 ..... 163
Horton v. R. R., 21 Mo. App. 147 ..... 383
Houston v. Tyler, 140 Mo. 252 ..... 717
Hovey & Brown v. Aaron, 133 Mo. App. 582 ..... 459
Howerton v. Ins. Co., 105 Mo. App. 575 ..... 3, 487
Hudson v. Cahoon, 193 Mo. 558 ..... 565
Hudson v. Glencoe Gravel Co., 140 Mo. 103 ..... 212
Hugumin v. Hinds, 97 Mo. App. 346 ..... 717
Hull v. Thomson Transfer Co., 135 Mo. App. 119 ..... 333
Hunter v. Wethington, 205 Mo. 284 ..... 717
Hurst v. R. R., 163 Mo. 309 ..... 618
Hyatt v. Wheeler, 101 Mo. App. 357 ..... 124

I.

Iba v. R R., 45 Mo. 469 ..... 23
Independence v. Ry., 86 Mo. App. 585 ..... 184

J.

Jantzen v. Ry. Co., 83 Mo. 171 ..... 452
Jerome v. United Ry. Co., 155 Mo. App. 202 ..... 375
Johnson v. Latta, 84 Mo. 139 ..... 157
Johnson & Co. v. Ice & Refrigerating Co., 143 Mo. App. 441 .. 645
Johnson Co. v. Bryson, 27 Mo. App. 341 ..... 658
Jones v. R. R., 178 Mo. 528 ..... 531

K.

Kane v. McCown, 55 Mo. 181 ..... 654
Kane v. Falk, 93 Mo. App. 209 ..... 66
Kansas City v. Hallett, 59 Mo. App. 160 ..... 664
Kansas City ex rel. v. Walsh, 88 Mo. App. 271 ..... 600
Kansas City Transfer Co. v. Neiswanger, 27 Mo. App. 356 .... 211
Kearney Bank v. Froman, 129 Mo. 430 ..... 224
Kelly v. Benas, 217 Mo. 1 ..... 84
Kendall v. Western Union Tel. Co., 56 Mo. App. 192 ..... 239, 633
Kings Lake Drainage & Sewer District v. Jamison, 176 Mo. 557, 288
Kleiber v. The Peoples Railway Co., 107 Mo. 240 ..... 331
Klotz v. Perteet, 101 Mo. 213 ..... 727
Klutts v. R. R., 75 Mo. 642 ..... 377
Knollenberg v. Nixon, 171 Mo. 445 ..... 212
Kuenzel v. Stevens, 155 Mo. 280 ..... 688

L.

Lacey v. Giboney, 36 Mo. 320 ..... 512
Landis v. McDonald, 88 Mo. App. 339 ..... 511

Digitized by Google

Landis v. Saxton, 89 Mo. 375 ..... 217
Landers v. R. R., 156 Mo. App. 580 ..... 626
Lane v. Logan Grain Co., 105 Mo. App. 215 ..... 194
Lange v. Ry., 115 Mo. App. 582 ..... 599
Laun v. R. R., 216 Mo. 563 ..... 120
Lenser v. St. Joseph Furn. Mfg. Co., 702 Mo. App. 209 ..... 600
Levels v. R. R., 196 Mo. 617 ..... 224
Lewis v. Frankle, 133 S. W. 64 ..... 231
Lieber v. Lieber, 23 Mo. 1 ..... 55
Light v. R. R., 89 Mo. 108 ..... 506
Lime & Cement Co. v. Wind, 86 Mo. App. 163 ..... 645
Lingenfelder v. Brewing Co., 103 Mo. 578 ..... 20
Link v. Jackson, 158 Mo. App. 63 ..... 716
Little v. Mercer, 9 Mo. 218 ..... 553
Little Rock Trust Co. v. S. M. & A. Ry. Co., 105 Mo. 669.... 107
Lloyd v. R. R., 128 Mo. 607 ..... 710
Loftis v. Street Ry. Co., 220 Mo. 470 ..... 426
Logan v. Field, 192 Mo. 54 ..... 238
Long v. Lackawanna Coal & Ice Co., 223 Mo. 713 ..... 638
Lucas v. Cella, 115 Mo. App. 395 ..... 600
Lutz v. Ry. Co., 123 Mo. App. 499 ..... 229

M.

Malloy v. R. R., 173 Mo. 75 ..... 37
Mancuso v. Kansas City, 74 Mo. App. 138 ..... 84
Mann v. Balfour, 187 Mo. 304 ..... 229
Manufacturing Co. v. Montgomery, 144 Mo. App. 494 ..... 644
Marsh v. Richards, 29 Mo. 99 ..... 73
Martin v. St. Joseph, 136 Mo. App. 316 ..... 23
Mason v. Warner, 31 Mo. 508 ..... 349
Mathieson v. R. R., 219 Mo. 548 ..... 565
Matlack v. Lare, 32 Mo. 262 ..... 106
Matthews v. R. R., 227 Mo. 241 ..... 617
Mayer v. McCabe, 73 Mo. 236 ..... 646
Merchants Bank v. Evans, 51 Mo. 335 ..... 512
Merrill v. Central Trust Co., 46 Mo. App. 237 ..... 645
Met. I. & Z. Mining Co. v. Webster, 193 Mo. 351 ..... 147
Miller v. St. Louis Hospital Assn., 5 Mo. App. 401 ..... 597
Miller v. Tel. Co., 141 Mo. App. 462 ..... 130
Miller v. Transit Co., 216 Mo. 99 ..... 46
Mineral Land Co. v. Ross, 135 Mo. 101 ..... 717
Missouri Real Estate Syndicate v. Sims, 179 Mo. 679 ..... 135
Mockowik v. R. R., 196 Mo. 550 ..... 627, 718
Montgomery v. Western Union Tel. Co., 50 Mo. App. 591 ..... 239
Montgomery County v. Auchley, 92 Mo. 126 ..... 178
Moore v. Mountcastle, 72 Mo. 607 ..... 231
Moore v. R. R., 146 Mo. 572 ..... 623
Moore v. Whitcomb, 48 Mo. 543 ..... 645
Morgan, Admr., v. Orongo Circle Mining Co., 160 Mo. App. 99 ..... 540
Morrell v. Lawrence, 203 Mo. 363 ..... 688
Mulloy v. Lawrence, 31 Mo. 583 ..... 106
Munro v. R. R., 155 Mo. App. 710 ..... 616

Mc.

McCarthy v. St. Louis Transit Co., 108 Mo. App. 317 ..... 377
McCune v. Goodwillie, 204 Mo. 306 ..... 354
McCloskey v. Publishing Co., 163 Mo. 22 ..... 688
McCrosby v. Murray, 142 Mo. App. 133 ..... 717
McDonald v. Matney, 82 Mo. 358 ..... 224
McDonald v. R. R., 219 Mo. 468 ..... 37

Digitized by Google

McFarland v. Accident Assn., 124 Mo. 204 ..... 635
McGinley v. Alliance Trust Co., 168 Mo. 257 ..... 396
McGrath v. Transit Co., 197 Mo. 97 ..... 59
McKenzie v. United Rys. Co., 216 Mo. 1 ..... 540
McNamara v. Slavens, 76 Mo. 329 ..... 49

N.

Nagel v. Ry., 167 Mo. 96 ..... 23
Nave v. Nave, 28 Mo. App. 505 ..... 55
Nivert v. R. R., 232 Mo. 626 ..... 120
Nugent v. Curran, 77 Mo. 323 ..... 179
Nugent v. Mill Co., 131 Mo. 241 ..... 152

O.

Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59 .... 592
O'Connor v. Koch, 56 Mo. 258 ..... 157
O'Connor v. St. Louis T. Co., 106 Mo. App. 220 ..... 596
Olney v. Eaton, 66 Mo. 563 ..... 353
O'Neill v. Kansas City, 178 Mo. 91 ..... 594
Orcutt v. Century Bldg., 201 Mo. 424 ..... 58, 59
Ordelheide v. Land Co., 208 Mo. 239 ..... 147, 259, 427
Orr v. Bradley, 126 Mo. App. 146 ..... 593
Otrich v. R. R., 154 Mo. App. 420 ..... 444

P.

Paden v. Van Blarcom, 181 Mo. 127 ..... 552
Padgitt v. Ry., 159 Mo. 143 ..... 51
Paper Co. v. Publishing Co., 156 Mo. App. 187 ..... 645
Parker v. Hannibal & St. Joseph R. R. Co., 44 Mo. 415 ..... 157
Parker v. Waugh, 34 Mo. 343 ..... 157
Patton v. R. R., 87 Mo. 117 ..... 262
Patrick v. Abeles, 27 Mo. 184 ..... 106
Paving Co. v. O'Brien, 128 Mo. App. 267 ..... 361
Pelkington v. Ins. Co., 55 Mo. 177 ..... 164
People's National Bank v. Central Trust Co., 179 Mo. 648 .... 110
Phelps v. Zinc Co., 218 Mo. 572 ..... 689
Phippin v. Ry., 196 Mo. 343 ..... 714
Pierce v. Lee, 197 Mo. 480 ..... 259
Poeppers v. R. R., 67 Mo. 715 ..... 552
Polhans v. Ry., 45 Mo. App. 157 ..... 23
Polk v. Ins. Co., 114 Mo. App. 518 ..... 164
Porter v. Ins. Co., 62 Mo. App. 526 ..... 7
Powell v. Palmer, 45 Mo. App. 236 ..... 599
Powell v. Tinsley, 137 Mo. App. 551 ..... 638
Powell v. R. R., 76 Mo. 80 ..... 330
Powers v. Ins. Co., 91 Mo. App. 55 ..... 84
Preston v. Mo. & Penna. Lead Co., 51 Mo. 43 ..... 283
Prewitt v. R. R., 134 Mo. 615 ..... 377

R.

Radtke v. Basket & Box Co., 229 Mo. 1 ..... 113
Ramp v. Ry., 133 Mo. App. 700 ..... 116
Randall v. Kleiber, 21 Mo. 557 ..... 96
Ray County Savings Bank v. Hutton, 224 Mo. 50 ..... 227
Reno v. FitzJarrell, 163 Mo. 411 ..... 727
Richardson v. Kansas City, 223 Mo. 325 ..... 113
Richardson v. Stowe, 102 Mo. 44 ..... 55
Rigby v. St. Louis Transit Co., 153 Mo. App. 330 ..... 426
Rigdon v. Ferguson, 172 Mo. 52 ..... 156

Digitized by Google

Robbins et al. v. R. R., 132 Mo. App. 306 ..... 212
Roberts v. Jones, 148 Mo. 368 ..... 727
Robinson v. Campbell, 8 Mo. 365 ..... 512
Rodgers v. Fire Ins. Co., 186 Mo. 248 ..... 553
Roe v. Bank, 167 Mo. 422 ..... 594
Roe v. Met. Street Ry. Co., 131 Mo. App. 128 ..... 688
Rogers v. Ins. Co., 155 Mo. App. 276 ..... 163
Rood v. Crocus Hill Mining Co., 157 Mo. App. 410 ..... 507
Root v. R. R., 195 Mo. 348 ..... 333
Roscoe v. Ry., 202 Mo. 576 ..... 59
Russ v. Ry. Co., 112 Mo. 45 ..... 593

S.

St. Louis v. Delassus, 205 Mo. 578 ..... 664
St. Louis v. Knox, 74 Mo. 79 ..... 92
St. Louis, K. C. & C. Ry. Co. v. Lewright, 113 Mo. 669 ..... 565
Salisbury v. Salisbury, 92 Mo. 683 ..... 55
Sallee v. Hays, 3 Mo. 116 ..... 100
Sallee v. St. Louis, 152 Mo. 615 ..... 30
School District v. Matherly, 84 Mo. App. 140 ..... 681
Schroeder v. R. R., 108 Mo. 322 ..... 717
Scroggins v. Ry., 138 Mo. App. 215 ..... 52
Seahorn v. Bank, 148 Mo. 256 ..... 717
Secrist v. Eubank, 104 Mo. App. 113 ..... 147
Seigle v. Ins. Co., 107 Mo. App. 457 ..... 3
Sevier v. Allen, 80 Mo. App. 187 ..... 50
Sevier v. Roddie, 51 Mo. 580 ..... 100
Sharp v. Odom, 121 Mo. App. 565 ..... 147
Shaw v. Goldman, 183 Mo. 461 ..... 600
Sheedy v. Union Press Brick Works, 25 Mo. App. 527 ..... 20
Sheehan v. Stockhouse, 10 Mo. App. 469 ..... 231
Shemell v. McKinney, 21 Mo. 692 ..... 214
Shirley v. Street Ry. Co., 114 Mo. App. 7 ..... 120
Smith v. Chapman, 71 Mo. 217 ..... 383
Smith v. Forrester-Nace Box Co., 193 Mo. 715 ..... 152
Smith v. R. R., 55 Mo. 601 ..... 727
Smith v. Smith, 20 Mo. 170 ..... 55
Smith v. Smith, 48 Mo. App. 612 ..... 55
Smith v. Smith, 151 Mo. App. 649 ..... 440
Smoot v. Kansas City, 194 Mo. 513 ..... 68, 113, 147
Spencer v. Bruner, 126 Mo. App. 94 ..... 592
Spencer v. Transit Co., 111 Mo. App. 653 ..... 103
Spink v. Muller, 77 Mo. App. 85 ..... 75
State Savings Assn. v. Kellogg, 63 Mo. 540 ..... 645
Stephenson v. Adding Machine Co., 150 Mo. App. 555 ..... 383
Sternberg v. Levy, 159 Mo. 624 ..... 157
Stevens v. Ins. Co., 120 Mo. App. 88 ..... 3, 4, 487, 489
Stewart v. Watson, 133 Mo. App. 44 ..... 229
Stid v. R. R., 236 Mo. 382 ..... 599
Stoetzele v. Swearinger, 90 Mo. App. 588 ..... 84
Surface v. Ins. Co., 157 Mo. App. 570 ..... 6
Swadley v. R. R., 118 Mo. 268 ..... 626

STATE.

State v Bateman, 198 Mo. 212 ..... 125
State v. Beckner, 194 Mo. 281 ..... 126
State v. Benton, 163 Mo. App. 639 ..... 727
State v. Binswanger, 122 Mo. App. 78 ..... 665
State v. Boyd, 108 Mo. App. 518 ..... 413
State v. Christopher, 134 Mo. App. 6 ..... 126
State v. Clark, 223 Mo. 48 ..... 208

Digitized by Google

State v. Conway, 18 Mo. 321 ..... 670
State v. Darling, 202 Mo. 150 ..... 563
State v. Donohue, 139 Mo. App. 639 ..... 727
State v. Gary, 124 Mo. App. 175 ..... 473
State v. Geiger, 45 Mo. App. 111 ..... 381
State v. George, 214 Mo. 262 ..... 125
State v. Harris, 216 Mo. 392 ..... 730
State v. Hyde, 234 Mo. 200 ..... 38
State v. Kelley, 206 Mo. 685 ..... 208
State v. Kessels, 120 Mo. App. 233 ..... 665
State v. Littrell, 170 Mo. 13 ..... 670
State v. Long, 201 Mo. 675 ..... 596
State v. Meed, 124 Mo. App. 413 ..... 215
State v. Mikel, 125 Mo. App. 287 ..... 381
State v. Montgomery, 63 Mo. App. 296 ..... 381
State v. Napper, 141 Mo. 401 ..... 125
State v. Oliphant, 128 Mo. App. 252 ..... 126
State v. Patterson, 159 Mo. 98 ..... 208
State v. Phillips, 233 Mo. 299 ..... 376
State v. Pollard, 174 Mo. 607 ..... 126
State v. Pyles, 206 Mo. 632 ..... 229
State v. Quinn, 94 Mo. App. 66 ..... 473
State v. Ruck, 194 Mo. 416 ..... 376
State v. Saunders, 53 Mo. 234 ..... 381
State v. Sharpe, 119 Mo. App. 386 ..... 381
State v. Shield, 13 Mo. 236 ..... 126
State v. Snider, 151 Mo. App. 699 ..... 126
State v. Taylor, 118 Mo. 161 ..... 223
State v. Thurman, 121 Mo. App. 374 ..... 376
State v. West, 84 Mo. 440 ..... 381
State v. Wilson, 152 Mo. App. 61 ..... 126

STATE EX REL.

State ex rel. v. Boatmen's Savings Inst., 48 Mo. 189 ..... 135
State ex rel. v. Broadus, 210 Mo. 1 ..... 214, 435
State ex rel. v. Cauthorn, 40 Mo. App. 94 ..... 143
State ex rel. v. County Court, 45 Mo. App. 387 ..... 143
State ex rel. v. Fidelity Co., 94 Mo. App. 184 ..... 202
State ex rel. v. Higgins, 84 Mo. 531 ..... 663
State ex rel. v. McCommon, 111 Mo. App. 626 ..... 662
State ex rel. v. Mayor, 57 Mo. App. 192 ..... 143
State ex rel. v. Patterson, 229 Mo. 364 ..... 143
State ex rel. Bayha v. Phillips, 137 Mo. 259 ..... 484
State ex rel. Gavin v. Muench, 225 Mo. 210 ..... 353
State ex rel. Grover v. Fowler, 108 Mo. 465 ..... 437
State ex rel. Iba v. Mosman, 231 Mo. 474 ..... 553
State ex rel. Pacific Mut. Life Ins. Co. v. Grimm, 239 Mo. 135 .. 354
State ex rel. Smith v. Berrymore, 142 Mo. App. 373 ..... 663
State ex rel. So. Missouri Pine Lbr. Co. v. Dearing, 180 Mo. 53 ..... 351, 352
State ex rel. Steel v. Phillips, 137 Mo. 259 ..... 484

T.

Taylor v. R. R., 185 Mo. 239 ..... 37
Thomas v. Moore, 46 Mo. App. 22 ..... 383
Thompson v. St. Charles County, 227 Mo. 220 ..... 110
Tinkle v. R. R., 21 Mo. 445 ..... 68, 113
Torpey v. City, 24 Mo. App. 288 ..... 30
Tower v. Moore, 52 Mo. 118 ..... 361
Tucker v. Allen, 47 Mo. 488 ..... 192
Turney v. Baker, 103 Mo. App. 390 ..... 594

Digitized by Google

U.

Utz v. Ins. Co., 139 Mo. App. 556 ..... 229

V.

Valle v. Ry. Co., 37 Mo. 445 ..... 192
Van Cleve v. Berkey, 143 Mo. 136 ..... 647
Vanderbeck v. R. R., 154 Mo. App. 321 ..... 531
Vaulx v. Campbell, 8 Mo. 224 ..... 717
Verdin v. City of St. Louis, 131 Mo. 26 ..... 513
Voss v. McGuire, 26 Mo. App. 452 ..... 211

W.

Wait v. R. R., 204 Mo. 491 ..... 436
Walther v. Null, 223 Mo. 111 ..... 225
Ward v. Board of Equalization, 135 Mo. 309 ..... 143
Warlick v. Peterson, 58 Mo. 408 ..... 262
Wehmeyer v. Mulvihill, 150 Mo. App. 197 ..... 412
Wellman v. R. R., 219 Mo. 126 ..... 59
Werth v. City of Springfield, 78 Mo. 107 ..... 553
Whitson v. Bank, 105 Mo. App. 177 ..... 717
Wilbur Stock Food Co. v. Bridges, 160 Mo. App. 122 ..... 458
Wilkinson v. Telegraph Co., 163 Mo. App. 73 ..... 635
Williams v. Lane, 62 Mo. App. 68 ..... 512
Williams v. R. R., 119 Mo. 316 ..... 617
Williamson v. Brown, 195 Mo. 313 ..... 262
Williamson v. St. Louis T. Co., 202 Mo. 345 ..... 540
Wischmeyer v. Richardson, 153 Mo. 556 .....
Witt v. State, 9 Mo. 671 .....668, 670
Womach v. City of St. Joseph, 201 Mo. 467 ..... 513
Wright v. Beardsley, 69 Mo. 548 ..... 106
Wright v. Chicago, etc. R. Co., 118 Mo. App. 392 ..... 417
Wright v. Richmond, 21 Mo. App. 76 ..... 405
Wright v Sanderson, 20 Mo. App. 534 ..... 73
Wyrick v. Wyrick, 162 Mo. App. 723 ..... 507

Y.

Young v. R. R., 227 Mo. 307 ..... 547
Young v. Schofield, 132 Mo. 650 ..... 648
York v. Everton, 121 Mo. App. 640 ..... 378

Digitized by Google

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

# COURTS OF APPEALS

AT THE

MARCH TERM, 1912.

(Continued from Volume 163)

## WILLIAM W. SPICKARD, Respondent v. FIRE ASSOCIATION OF PHILADELPHIA, Appellant.

Kansas City Court of Appeals, April 29, 1912.

1. **INSURANCE: Three-fourths Valuation: Valued Policy: Estoppel.** Under the statute, Sec. 7030, R. S. 1909, an insurance company is directed not to issue a policy of fire insurance for more than three-fourths of the value of the property; but when such value is fixed and the policy issued the company is estopped from asserting that the policy was for more than three-fourths of the value at the date of the insurance (Gibson v. Ins. Co., 82 Mo. App. 515; distinguishing Surface v. Ins. Co., 157 Mo. App. 570); and recovery may be had for the face of the policy less depreciation since date of insurance.

2. **———: ———: ———: Depreciation: Sales: Salvage.** But the fact that the policy is thus practically a valued policy will not prevent the amount of liability being reduced by depreciation, sales, decay or salvage.

3. **———: ———: ———: Books: Inventory: Forfeiture.** When a policy of fire insurance on personal property provides for keeping of books and inventories and the insurer does not demand their production after the fire, no forfeiture can be had for want of compliance with the policy.



Digitized by Google

Appeal from Clinton Circuit Court.—*Hon. Alonzo D. Burnes,* Judge.

AFFIRMED.

*J. A. Clark* and *Fyke & Snider* for appellant.

*E. J. Smith* and *W. T. Herndon* for respondent.

ELLISON, J.—Plaintiff's action is based on a policy of fire insurance issued to him by defendant, in the sum of $1200 on his stock of general merchandise and fifty dollars on store furniture. The judgment in the trial court was for the plaintiff in the full amount of the policy.

The policy contained a provision that in the event of loss the company would "not be liable for a greater amount than three-fourths of the actual cash value of the property covered by the policy at the time of such loss, and in case of other insurance, whether policies are concurrent or not, then for only its pro rata proportion of such three-fourths value. Total insurance permitted is hereby limited to three-fourths of the actual cash value of the property hereby covered, and to be concurrent herewith."

Defendant, by its answer, set up that clause, as a partial defense to the amount claimed by plaintiff. The defense was disallowed by the trial court, and that presents the principal question for decision.

The evidence showed that there were two other policies on the property, one for the exact amount of the one in suit, and taken on the same day. The other for $2400 on the stock and $100 on the furniture, taken on the 26th day of March, 1910. The fire occurred on the 1st day of April, 1910, causing a total loss of the property on hand at that time. These policies aggregate $5000. There was evidence in behalf of plaintiff, tending to prove that the value of the goods at the time

Digitized by Google

of the fire, after allowing for sales and purchases, was $8000, and of the furniture was near $400. Defendant contends that under the terms of the policy as pleaded in its answer, its liability should be measured on a three-fourths value basis; and as there was other insurance, its liability on the policy in suit was its proportion of three-fourths.

Under repeated rulings of the different appellate courts of the state we must reject defendant's view and approve that taken by the trial court. By the terms of the statute (Sec. 7030, R. S. 1909) it is declared that "No company shall take a risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding." This statute has been held to "enjoin upon the insurance company not to take a risk at more than three-fourths of the value of the property insured, but that when the value is fixed and the risk taken for a given amount, that sum cannot be questioned afterwards, though it should, in fact, be more than three-fourths of the value." [Gibson v. Mo. Town Mutual Ins. Co., 82 Mo. App. 515.] It was further held in that case that if between the date of insurance and the fire, the value should be lessened by an excess of sales over purchases in replenishing the stock, such decrease would of course, be deducted from the value; and so likewise would changes lessening the value, arising from other causes, between the issuance of the policy and the fire. And that view of the statute has been several times reasserted by this court. [Seigle v. Ins. Co., 107 Mo. App. 457; Hanna v. Ins. Co., 190 Mo. App. 152; Crossan v. Ins. Co., 133 Mo. App. 594, and in an opinion by the presiding judge in the recent case of Gragg v. Ins. Co., 132 Mo. App. 408.] It was likewise approved by the St. Louis Court of Appeals in Howerton v. Ins. Co., 105 Mo. App. 575, 583, and Stevens v. Ins. Co.,

Digitized by Google

120 Mo. App. 88, 105-108, where the question is fully considered by Judge NORTONI. It has also met the approval of the Springfield Court of Appeals in an opinion by presiding Judge NIXON in Hilburn v. Ins. Co., 140 Mo. App. 355, 368.

If defendant's insistence that it only contracted to insure for three-fourths of the actual value of the property, and should not be held for more, should be granted, it would not aid its case; for in making practical application of that fact, defendant leaves out of view that the sum named in the policy *is* only three-fourths of the actual value, or less. For, as we have just explained, the company could not insure for a sum in excess of that proportion.

So whenever the property is of the same value at the date of the fire that it was when the insurance was taken, the sum named in the policy is the measure of the insured's loss. And if it is claimed that the property was not so valuable at the date of the fire as it was when insured, the value at the time of insurance will be considered by force of the statute, as a sum of which the face of the policy is three-fourths and that will be the basis for calculation. And by subtracting the amount of depreciation from the total value at the date of insurance (being a sum of which the face of the policy is three-fourths) the remainder would represent the insured's loss. Thus, if the policy was for $3000 that would fix the value of the property at $4000, and if the depreciation was as much as $1000 that subtracted from the total value of $4000 would leave a loss to the owner of $3000, all of which he could recover. If the depreciation was $2000, that would leave the owner's loss at only $2000, and that would be the extent of his recovery. [Stevens v. Ins. Co., 120 Mo. App. l. c. 106-108.]

If there are several policies the same rule of interpretation and basis of calculation obtains. The total value of the property will be considered to be a

Digitized by Google

sum of which their aggregate amount is three-fourths. [Hanna v. Ins. Co., supra.]

At the argument stress was laid on the tendency to evil results said to be like to flow from the statute which we have discussed. In so doing the views of the Supreme Court on a similar statute, as expressed in Daggs v. Ins. Co., 136 Mo. 382, 394, 395, have been entirely overlooked, caused, perhaps, by the particular matters to which we refer not appearing in the syllabus reported. Strong defense of such statutes and the cause of their enactment is there stated. Judge GANTT, for the court, said:

"The learned counsel for defendant have filed a most elaborate brief, a large portion of which is directed at the supposed bad policy of the statute, an argument much more appropriate before the Legislature than this court. They insist it violates the fundamental idea of insurance, which is indemnity; that it encourages arson; that it increases the cost of insurance.

"The time alloted us will not permit a discussion of such considerations, even if we felt called upon to defend the wisdom of the Legislature. It is well known that the practice of the insurance companies, both life and fire, led to legislation now so strenuously attacked. Promises held forth to the assured in the policies in use when this and similar statutes were enacted had 'too often proven a delusion and a snare,' and, as the courts were powerless to correct the evil, the Legislature interposed, not only in Missouri, but in many of the states of the union, to remedy the wrong.

"The manifest policy of the statute is to prevent, rather than encourage, over-insurance, and to guard, as far as possible, against carelessness, and every inducement to destroy property in order to procure the insurance upon it. It was also designed to prevent insurance companies from taking reckless risks in or-

Digitized by Google

der to obtain large premiums by advising them in advance that they would be held to the value agreed upon when the insurance was written.

"No company is bound to insure any piece of property without first making a survey and examination of the premises, and it is not compelled to insure the full value then. But having the opportunity to inspect fully before insuring, and then fixing the amount of the risk, and receiving the premium based upon such valuation, it ought to be forever estopped, in case of a total loss, from denying the valuation agreed upon. . . . .

"The policy of the law seems to us wise and wholesome, but, if it were not, it is the province of the Legislature to repeal it, and not ours to usurp legislative authority. More care in the selection of agents and more care in the inspection of the insured property will dispense with many of the objections urged against the policy of this statute.

"Long prior to the enactment of this statute 'valued policies' were in use as the result of contracts. By a 'valued policy' a valuation was fixed in advance by way of liquidated damages to avoid making a valuation after the loss had occurred. Such agreements have been uniformly upheld against the claim that they were wagering contracts . . .; the construction put upon a 'valued policy' being that the sum agreed upon was *conclusive,* both at law and in equity, *save in cases of fraud.*"

Defendant cites as sustaining its position the recent case in this court of Surface v. Ins. Co., 157 Mo. App. 570. The rule we have stated as having been decided by each of the appellate courts of the state is expressly recognized in that case and quotation is made from Gibson v. Ins. Co. But it appears in that case that there had been a depreciation of the property, by sales and otherwise, after the policy was issued, and that the parties, seemingly ignoring the

Digitized by Google

terms of the policy as fixed by law, made an agreement fixing the value of the property at the date of the fire and of the amount of the owner's loss. The rights of one party and the liability of the other as determined by the policy and by the statute were ignored. That agreement governed the judgment in that case.

Objection was made to evidence of the value of the goods at the time of the fire on the ground that it was not alleged in the petition. The petition was amended so as to show value, and the objection was therefore properly overruled.

There was an iron safe clause in the policy and it is claimed that plaintiff failed to make inventories and to keep books showing sales and credit and for cash, as well as purchases in replenishing stock, and to produce such books and inventory. There was no demand made of plaintiff after the fire to produce books and inventories, and cause of forfeiture on that ground was thereby waived. [Carp v. Ins. Co., 116 Mo. App. 528; Porter v. Ins. Co., 62 Mo. App. 526.]

But aside from the consideration just mentioned, we think the evidence showed substantially all that was necessary as to the value of the stock at the time of the fire. An inventory of the stock had been taken in duplicate. Plaintiff lost the copy retained by him, but he secured the other copy and it was put in evidence. An account of sales, on credit and for cash, was kept in a book burned in the fire, but the entries in this book were copied and this was in evidence.

It is clear that defendant considered that plaintiff's claim was fraudulent and he was charged with false swearing as to the value of the goods and the cause of the fire, but that issue was submitted to the jury.

After examination of each of defendant's complaints we see no cause for interference, and affirm the judgment. All concur.

Digitized by Google

THAYER-MOORE BROKERAGE COMPANY, Appellant, v. W. F. CAMPBELL et al., Defendants, R. A. CAMPBELL and R. S. CAMPBELL, Respondents.

Kansas City Court of Appeals, April 29, 1912.

1. **COUNTERCLAIM: Set-off.** A counterclaim must constitute a good cause of action in favor of defendant and against plaintiff, and must be a claim upon which a separate action would lie. If the facts do not constitute such a cause of action, they do not constitute a counterclaim, although they may be sufficient to constitute a set-off.

2. **———: ———: Unliquidated Damages.** To constitute a set-off the demand must be in the nature of a debt, and as an unliquidated claim for damages is not included in the term "debt" it cannot be made the subject of set-off.

3. **CONTRACT: Breach: Damages.** A person, who commits a breach of a contract and thereby injures the other party, is not permitted to escape liability because the amount of the damages he caused is uncertain and not susceptible of accurate proof. The jury are invested, in such cases, with the function of fixing the amount from the facts and circumstances shown by proof.

Appeal from Jackson Circuit Court.—*Hon. James H. Slover,* Judge.

AFFIRMED.

*Scarritt, Scarritt, Jones & Miller* for appellant.

*T. B. Wallace* for respondents.

JOHNSON, J.—This is an action on two promissory notes of three hundred and fifty dollars each executed by defendants W. F. Campbell and C. S. Campbell as principals and R. A. Campbell and R. S. Campbell as sureties in payment to plaintiff of the rent for one year of a farm of 120 acres in Jackson county

Digitized by Google

which plaintiff, the owner, leased to W. F. Campbell and C. S. Campbell who operated a dairy on the farm. Both notes were executed February 21, 1907. One by its terms matured August 1, 1907, the other on November 1st of that year. Payments amounting to $215.25 were made by defendants and credited on the note first due leaving a remainder on that note of $134.75 with interest at eight per cent per annum from August 1, 1907. No payments were made on the other note which bore interest at eight per cent from the date of its maturity. The credits on the first note consisted of $150, cash paid by defendants and three items of thirty-nine dollars and twenty-five cents, six dollars and twenty dollars respectively for services rendered by defendants to plaintiff. By the provisions of the lease the farm was let to defendants R. A. and R. S. Campbell for a period of one year from March 1, 1907. The farm is seven or eight miles south of the business center of Kansas City and at the time of the letting it was the purpose of plaintiff to sell the place either in gross or in subdivisions. To permit the carrying out of this purpose and to provide for the dispossession of defendants of any part of the farm sold during the term and for a proper allowance to defendants on account of such dispossession the lease contained the following provisions:

"Said second party (these lessees) agrees to farm said land in a first-class maner, and to keep all shrubbery and fruit trees around the house and in the garden and orchard, properly trimmed, and in good condition, and all the fences and gates in good condition, and to keep the weeds and underbrush cut out on the pasture land. This lease being made upon the special condition that the whole place is to be kept in good condition, it being the intent of said first party to sell said farm during the summer of 1907, and to aid in that purpose, said first party makes this lease con-

Digitized by Google

ditioned upon the whole place being kept in an attractive manner.

This lease is made with the express understanding that said first party intends to sell said farm, and for that purpose, its representatives shall have free access to any part thereof at all proper times. To effect said sale, said first party may divide it up into small tracts and will have numerous customers looking over the place, and said second party agrees to assist in such sale by giving the prospective purchaser free access to such information as the prospective purchaser may desire of any part of said farm and buildings.

In case of the sale of any portion of said farm before the expiration of this lease and the purchaser shall want possession thereof, the said second party shall be allowed a rebate for the unexpired term of this lease, as the time and amount of land of which he is dispossessed shall bear to the whole, and if there are any growing crops upon such land, he shall be allowed a fair valuation of said crops at the time the land is taken. If the land of which he is dispossessed, should include the house and improvements surrounding it, he shall be allowed a drawback of ——— dollars per month for the use of the house for the unexpired term of the lease and said second party agrees to give possession to any part of said land that may be sold, upon being given thirty (30) days' written notice from said first party. In the event that said first and second parties cannot agree as to what damages shall be allowed for growing crops, they shall each appoint one man as arbitrator and the two so chosen shall appoint a third man, and these three shall fix the damages and the amount agreed upon by these arbitrators shall be paid to said second party, but the vacation and surrender shall take place at once, or within thirty (30) days, upon the request of first party, irrespective

Digitized by Google

of said time when the valuation aforesaid is determined."

Pursuant to this lease defendant lessees took possession of the farm and conducted a dairy thereon during the whole term. They kept from thirty-five to forty milch cows and sold all the milk to a dealer. They do not claim in their testimony that the acts of plaintiff on which they found their defense and counterclaim damaged the cows, decreased their output or prevented the sale of the product to the dealer with whom they had a contract. A part of the farm was under cultivation and a part was in meadow and pasture land. Defendants, whose possession was not disturbed during the first five months of their term, had growing and thriving crops of millet, cane and hay. Shortly after the beginning of the term plaintiff had the land surveyed and platted into an addition. The plat subdivided the land into blocks and lots and streets and alleys and plaintiff made a number of sales of lots during the season, but delivered the actual possession to the purchaser of only one tract so sold. That tract contained four lots or about half an acre and was situated in defendants' millet field. There is no dispute over the fact that defendants lost the crop on that tract and became entitled to reimbursement for that loss.

On August 23, 1907, plaintiff wrote defendants the following letter: "After considering the whole situation, we have concluded it would be best for all parties to cancel our arrangement and terminate the lease on the house and premises you now occupy, located in the southeast quarter (¼) of the southwest quarter (¼), section twenty (20), and the east one-half (½) of the northwest (¼) quarter, section twenty-nine (29), township 48, range 33, Jackson county, Missouri, under the terms of the lease entered into between us on the 23d day of February, 1907.

"We would like for you to arrange to give us possession on the 30th day of September. We will adjust

Digitized by Google

with you the amount of rent due up to that time, and we write you this now so that you will have time to look around and get another place without too much inconvenience to yourself. We are obliged to get the property in shape so that we can sell it, and this necessitates tearing down pretty much all of the fences and getting the whole premises in attractive shape, and we don't see that you could use it to advantage while we are working on it in this way. The note for rent the first of August is still unpaid and we would like to have the money for it."

Defendants being unable to rent another farm at that time in the year declined to accede to this request and remained on the place. Plaintiffs were anxious to make their addition more attractive to customers and to that end sought and obtained the consent of plaintiffs to the grading of some of the platted streets through the fields of millet, cane and hay. The agreement which was not reduced to writing thus is stated by one of the defendants:

"Q. Did you complete any agreement at that time about the streets? A. No, sir. Q. When did you? A. Mr. Thayer came out sometime the next week and said he wanted to put through a street or two, and wanted to know where it wouldn't damage me too much. He said they wanted to open the place—they didn't want it to look so much like the country—wanted to make it look like town. Q. Was there anything said about payment of damages? A. Yes, they said whatever the damages was, they would settle it. He said they wanted me to grade some streets—I could work out there—if I would let them put the streets through—that later on they would have to do some grading."

The agreement is stated differently by a witness introduced by plaintiff. We quote from his testimony:

"Q. Tell the jury what understanding was had at that time, what agreement was entered into with

Digitized by Google

Mr. Campbell in reference to the opening of those streets? A. Well, it has been quite a long time ago, but as near as I can recollect the facts they are about as follows: We wanted to get Mr. Campbell to leave the place, and he wouldn't leave—he wouldn't give it up. We were willing for him to give it up and he wouldn't do so and we then arranged with him about marking out some streets there and to reimburse him for any standing crops he might have. Q. What crops were mentioned? A. The only crop I saw there was a little Kaffir corn and some millet—some cane and millet. Q. Was any other crop mentioned or figured on between you? A. No, sir. Q. What else, if anything, was to be allowed him—just tell the whole thing—what the agreement was? A. We were to allow him for any damage that he had to his crop and any damage that might result, that is, any ground we might take from him for streets, it is my understanding we would allow him money for that, if it disturbed anything. Q. Was that the whole of the agreement? A. That was my understanding of it, as far as I remember it, nothing more."

The evidence of defendants tends to show that pursuant to this agreement plaintiff had a number of streets graded and that damage thereby was wrought to the growing crops to the amount of about $300.

The fences on the place were destroyed at places required by the prosecution of the work. The damage to the crops was caused partly by the grading work and partly by inroads of live stock that found ready access to the fields through the numerous openings in the fences. Only one inclosure was left intact—the cow lot—and during the latter half of the term defendants were put to the annoyance and trouble of herding their stock and of looking for cows that strayed away. It is not claimed by defendants that this additional work caused them direct pecuniary loss. They did not find it necessary to hire extra help and their

Digitized by Google

only complaint is that they and their servants were burdened with additional labor on account of the open fences. Defendants filed an answer and counterclaim. In the answer the contract expressed in the lease and the subsequent oral contract were pleaded and the following items of damage were alleged as a defense to the notes: Three hundred dollars on account of damage to crops caused by the grading and removal of fences; $62 on account of the loss of a cow that strayed away; $225 "on account of land taken by the streets and to perform contracts of sales made by plaintiff" and $500 damages for "annoyance and inconvenience and extra work and labor in attempting to take care of the cows and other live stock on said premises after the plaintiff had removed the fences and begun to cut the streets through the said farm."

The counterclaim pleaded the same facts as the answer and treated these items of damages as proper subjects of counterclaim. At the request of defendants the court instructed the jury "that if you believe from the evidence that after the defendants went into possession of the said premises under the lease in question the plaintiff requested of these defendants permission to grade streets through the said premises and take down and remove fences therefor and promised and agreed to pay these defendants if they would permit such streets to be graded and fences to be taken down and removed any and all damages that might be sustained by the defendants by reason of the grading of the said premises and removal of said fences and that in pursuance of said agreement the defendants took possession of the parts of the said premises, graded streets through the same and removed the fences, then you are instructed that the defendants are entitled to recover on their counterclaim herein all damages shown by the evidence to have been sustained by the defendants on account of the grading of said streets through said premises and the removal of the

Digitized by Google

fences therefrom; and in estimating such damages you are entitled to take into consideration any destruction of growing crops shown to have been caused by the grading of such streets and taking down of said fences, not exceeding the sum of $300, the loss of any live stock shown to have been occasioned thereby, if any, not exceeding the sum of $62 and such general damages, inconvenience, expenses and trouble the defendants are shown to have sustained on account of the grading of the said streets and removal of fences and the occupation by the plaintiff of said premises for said purpose, not exceeding the sum of $500. And also such further sum as will compensate the defendants for being deprived of the use of the land so taken for such streets for the balance of the term of said lease."

The verdict of the jury was as follows: "We, the jury, find the issues for the plaintiff on its notes, principal and interest, to the sum of $627.43. We further find the issues for the defendants R. A. and R. S. Campbell on their counterclaim and assess their damages at $942.68. Deducting the lesser from the greater, we find for the defendants, R. A. and R. S. Campbell in the amount of $315.25.

"Ernest G. Gould, Foreman."

At the hearing of the motions for a new trial and in arrest of judgment defendants entered a remittitur of sixty-two dollars the damages claimed for the lost cow and the court, after overruling the motions rendered judgment for defendants in the sum of $253.25. Plaintiff appealed.

The damages for the lost cow being eliminated by the remittitur the judgment before us includes an allowance to defendants on their counterclaim of these items of damages, viz., injury to crops alleged at $300; extra labor and trouble caused by the destruction of fences alleged at $500, and damages on account of land taken for streets and vacated on notice, alleged at

Digitized by Google

$225. The total amount of these alleged damages is $1025 and the total of the damages included in the judgment for these three items is $880.08.

Counsel for plaintiff argue that none of these items is a proper subject of counterclaim but that all are matters of defense to the notes and that inasmuch as the verdict was for the plaintiff for the full amount of the notes, in effect, it was a finding against defendants on all matters of defense and, therefore, that the verdict on the counterclaim being entirely unsupported should be treated as a nullity and judgment should go for plaintiff for the full amount of the verdict in its favor. Section 1807, Revised Statutes 1909, thus defines a counterclaim:

"The counterclaim . . . must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: First, a cause of action arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action; second, in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated, in such manner that they may be intelligently distinguished, and refer to the cause of action which they are intended to answer."

Section 1866, Revised Statutes 1909, provides: "If two or more persons are mutually indebted in any manner whatsoever, and one of them commence an action against the other, one debt may be set off against the other, although such debts are of a different nature."

Digitized by Google

In Estate Co. v. Arms Co., 110 Mo. App. 406, speaking of these statutes we said: "Under the statutes a set-off cannot be a counterclaim, nor vice versa. The courts of this state have recognized the distinction between set-off and counterclaim." And further we held that "to constitute a set-off the demand must be in the nature of a debt. [Waterman on Set-Off, sec. 133.] And the term "debt" as defined by most of the appellate courts of the country, does not include a claim for unliquidated damages."

The distinction between set-off and counterclaim thus is stated by the Supreme Court in Emery v. Railway Co., 77 Mo. 339:

"The growing principle of recoupment was recognized by the Legislatures of many of the states, including our own, and under the name of counterclaim it was so enlarged as to give the defendant the benefit of the difference between his cross demand and the plaintiff's claim, when the excess should prove to be in his favor. [Chandler v. Childs, 42 Mich. 128.] The counterclaim of our Practice Act includes everything which in modern times goes under the name of recoupment proper, as well as much more; for it extends to offsets and many cross actions not in any way connected with the plaintiff's demand. [Pomeroy, Remedies, sec. 736; Flesh v. Christopher, 11 Mo. App. 483; Gordon v. Bruner, 49 Mo. 570; Conner v. Winton, 7 Ind. 523; Pattison v. Richards, 22 Barb. 146.] But no right of recoupment as understood in modern times, or counterclaim, can exist in the absence of a cause of action in favor of the defendant. A cross action is always implied in its terms. [Pomeroy, Remedies, sec. 733; Carey v. Guillow, 105 Mass. 18; Clark v. Wildridge, 5 Ind. 176; Vassear v. Livingston, 13 N. Y. 257; White v. Reagan, 32 Ark. 281.] When it falls short of constituting a cause of action, it belongs to the class of partial defenses in reduction or mitigation of dam-



Digitized by Google

ages, and ought to go by the name of reduction of damages. [Pomeroy, Remedies, sec. 733; Moffet v. Sackett, 18 N. Y. 522.]

It is undoubtedly true that when the plaintiff sues for the price of labor the defendant is at liberty to recoup against his claim, any damages suffered through the negligence of the plaintiff whereby the value of the consideration was depreciated. [Eaton v. Woolly, 28 Wis. 628; Pomeroy, Remedies, sec. 732.] In was in this class of cases, the modern use of the term recoupment was first recognized in England in a restricted sense. But in such cases it will be found that a valid cross action existed in favor of defendant, and in the use of it he was often confined to such damages as depreciated the value of the consideration."

And in 25 Am. and Eng. Ency. of Law, p. 572, we find an accurate definition of counterclaim: "A counterclaim must constitute a good cause of action in favor of the defendant and against the plaintiff, and belong to one of the several classes of actions mentioned in the statute. It must be a claim upon which a separate action would lie and upon which the defendant could recover a several judgment against the plaintiff. If the facts do not constitute a cause of action in favor of the defendant and against the plaintiff, they do not constitute a counterclaim, though they may be sufficient to constitute a defense by way of set-off or otherwise."

All of the demands pleaded in defendant's counterclaim were unliquidated and were not debts in the legal sense of that term. A debt is a legal liability to pay a specific sum of money and an uncertain and unliquidated claim for damages whether such claim be founded in tort or in contract is not a debt. [See 2 Words and Phrases, title "Debt."] The right of set-off is purely statutory and since the statute makes debt the sole subject of set-off and since defendants' claims, being for unliquidated damages were not debts, it fol-

Digitized by Google

lows the verdict for plaintiff on the notes was not an adjudication of defendants' demands though they were pleaded in the answer. Under the statutory definition of counterclaim as construed by the decisions to which we have referred these demands were a proper subject of counterclaim and we hold that plaintiff was not entitled to a different judgment from that authorized by the verdict on the principal action and the counterclaim.

Further plaintiff contends: "There was no basis in law or fact for that part of the instructions which told the jury that, in estimating defendants' damages, they were entitled to take into consideration 'such general damages, inconvenience, expenses and trouble the defendants are shown to have sustained on account of the grading of the said streets and removal of fences and the occupation by the plaintiff of said premises for said purposes, not exceeding the sum of $500.' "

On this subject counsel argue, first, that the acts of plaintiff in grading the streets and destroying the enclosures were authorized by the terms of the lease and as the leases did not include such damages among those for which defendants should receive compensation the contract contemplated that the loss occasioned by such acts should fall on defendants. We do not so interpret the lease. It gave plaintiff the right to survey the land, to plat it into an addition and to make sales of lots but it did not authorize the grading of streets, the destruction of fences, or any other spoliation of defendants' use of the farm than that caused by the vacation of such lots as might be sold during the season. The conduct of plaintiff shows that its officers so construed the contract. They tried to obtain a cancellation of the lease and a surrender of the farm on the plea that they intended practically to destroy it as a farm and failing in this effort made a new contract with defendants by which, in consideration of being allowed to grade streets, plaintiff agreed to

Digitized by Google

pay all damages defendants would suffer therefrom. The rule invoked by plaintiff "that a promise to pay a man for doing that which he is already under contract to do is without consideration" (Lingenfelder v. Brewing Co., 103 Mo. 578), is without application since the subsequent contract secured rights to plaintiff not granted in the lease and in consideration of the grant of such additional rights plaintiff agreed to compensate defendants by giving them a just equivalent, i. e., compensation for the loss the exercise of the rights would inflict on them. The subsequent contract was supported by a sufficient consideration and we pass to the second position taken by plaintiff which is that the evidence does not show that defendants suffered any loss on account of extra labor and trouble that could be measured in damages. The rule relied on by plaintiff thus is stated by BROADDUS, P. J., in Burdall v. Johnson, 122 Mo. App. 119: "The rule in such cases is properly expressed in Cravens v. Hunter, 87 Mo. App. 456, as follows: 'Where the amount of damages cannot be estimated with approximate correctness there being no sufficient data from which a witness could make an estimate, plaintiff is not entitled to recover more than nominal damages.' And, 'No substantial damages can be recovered by one for an injury to his property rights, without evidence furnishing a basis for a money estimate.'" [Sheedy v. Union Press Brick Works, 25 Mo. App. 527.]

That rule is sound. It is always incumbent upon the party who asserts he has been damaged to adduce proof of the elements of his damage but the rule against the recovery of uncertain damages relates to uncertainty as to the cause rather than uncertainty as to the measure or extent. A person who commits a breach of his contract and thereby injures the other party is not permitted to escape liability because the amount of the damages he caused is uncertain and is not susceptible of accurate proof. In such cases the

Digitized by Google

burden of the wronged party does not require him to prove that which is incapable of proof but to prove all the facts and circumstances bearing on the subject of the extent of the damage and the jury are invested with the function of making certain that which in its very nature is uncertain by reducing to a pecuniary value elements which, of themselves, carry no standard by which such value may be measured with certainty. [8 Am. and Eng. Ency. Law, 614, *et seq.*; Goldman v. Wolff, 6 Mo. App. 492; Barngrover v. Maack, 46 Mo. App. 407; Golden v. Construction Co., 100 Mo. App. 20; Spencer v. Railroad, 120 Mo. 159; Telephone Co. v. Railroad, 202 Mo. 686; Ready v. Railway, 98 Mo. App. 467; Dean v. Railroad, 199 Mo. 397.] In the case last cited it is said: "The law only requires the character of proof of which the particular issue in the case, in the inherent nature of things is susceptible," and, further, "nor does it appear that the case was susceptible of proof of any more satisfactory character than that introduced; hence there is a sufficient basis upon which the good judgment and experience of the jury could act in making a finding."

It is true defendants were not compelled to employ extra help; did not suffer a diminution of the product of the dairy and sold the product without loss but owing to the destruction of the inclosures on the farm they and their servants were compelled to perform extra labor and to endure the annoyance of looking after thirty-five or more milch cows which each morning had to be turned loose to graze, watched during the day and collected at night. Defendants are entitled to compensation for that labor and trouble. One of the most fundamental rules of the law of damages is that the injured party should receive compensation for the actual loss sustained in consequence of the injury.

We regard the facts and circumstances adduced by defendant as constituting sufficient evidence to go

Digitized by Google

to the jury. It was the best proof of which a case of this character is susceptible and the fact that it carries no pecuniary standard of its own is due to an inherent defect common to the class of cases and not peculiar to the individual case. In what we have said we have answered the principal questions urged by plaintiff. Other points have been examined and are ruled against plaintiff. The cause was fairly tried and accordingly the judgment is affirmed. All concur.

---

## BISHOP STRATTON, Appellant, v. M. A. DUDDING, Respondent.

**Kansas City Court of Appeals, April 29, 1912.**

1. **FRAUD AND DECEIT: Pleading: Justice Courts.** Plaintiff sued in a justice court for damages sustained by reason of the misrepresentations of defendant as to the age and condition of a cow bought from defendant. The statement filed in the justice court is held to be sufficient especially as to an attack made for the first time after verdict.

2. **JUSTICE COURTS: Statement: Sufficiency.** The rule that a mere charge of fraud in a petition without specification of the acts which constitute the alleged fraud does not state a good cause of action, does not apply to justice courts where technical accuracy is not required and where a statement is deemed sufficient if it advises the defendant of the nature and amount of the demand with sufficient definiteness to bar another action for the same cause.

3. **FRAUD AND DECEIT: Instructions: Actual Knowledge.** In an action for fraud and deceit an instruction, which directed the jury to return a verdict for defendant unless they believed from the evidence that defendant had *actual knowledge* of the falsity of his representations, is erroneous.

Appeal from Johnson Circuit Court.—*Hon. A. A. Whitsett,* Judge.

REVERSED AND REMANDED.

Digitized by Google

*James A. Kemper* for appellant.

*R. M. Robertson* and *N. M. Bradley* for respondent.

JOHNSON, J.—This is an action for fraud and deceit commenced in a justice court by the filing of the following statement:

M. A. Dudding to

Bishop Stratton, Dr.

To damages sustained from misrepresentation as to value, age and condition of one certain milch cow, bought from the said M. A. Dudding, on Feb. 8, 1910 .....$25.00.

A trial in the circuit court where the cause was taken by appeal resulted in a verdict and judgment for defendant and plaintiff appealed. Counsel for defendant attack the sufficiency of the statement to plead a cause of action and invoke the well-recognized rule that a mere charge of fraud in a petition without specification of the act or acts which constitute the alleged fraud amounts to nothing and cannot be accepted as the statement of a good cause of action. [Nagel v. Railway, 167 Mo. l. c. 96, and cases cited.]

But that rule does not apply to justice courts where technical accuracy is not required and where a statement is deemed sufficient if it advises the defendant of the nature and amount of plaintiff's demand with sufficient definiteness to bar another action for the same cause. [Iba v. Railroad, 45 Mo. 469; Polhans v. Railway, 45 Mo. App. l. c. 157; Hall v. Railroad, 124 Mo. App. 664.] The statement before us is sufficient especially as to an attack made for the first time after verdict. The parties to the action are farmers and the subject of dispute is a milch cow plaintiff purchased for fifty dollars at an auction sale defendant had at his farm. In substance the evidence of plaintiff tends to show that defendant represented at

Digitized by Google

the sale that the cow was seven or eight years old, was sound, and gave from two and one-half to three gallons of milk per day; that plaintiff believed these statements and relying on them bought the cow; that each of the statements was false and that their falsity could not be discovered by any reasonable inspection that plaintiff made or could have made at the time. It developed that the cow was eleven or twelve years old, had a permanently diseased bag and gave from one to one and a half gallons of milk per day, instead of the quantity represented by defendant, but these defects which the evidence of plaintiff depicts as latent were not discovered by him until after the sale. The evidence of defendant contradicts that of plaintiff on all essential points and tends to show that the defects of which plaintiff complains, if existent, were open to ordinary inspection and that full opportunity was given plaintiff and other bidders to examine the animals and bidders were invited by defendant to avail themselves of such opportunity.

The gist of the cause of action asserted by plaintiff is not a breach of warranty, express or implied, but the tort of false and fraudulent representations. An action of the latter character cannot be predicated of representations as to facts that fall within the scope of the operation of the rule of *caveat emptor*. That rule, the vigor of which remains unimpaired, demands of a buyer the exercise of reasonable care and prudence in his purchases. He must avail himself of an opportunity to examine the article offered for sale and make reasonable use of his skill and judgment to discover defects. As to defects that are open to such inspection he has no right to rely on the representations of the seller. As to those matters of which it fairly may be said the vendor and vendee stand on equal ground, the vendee must take care of himself or else protect himself by a contract of warranty. He is not allowed to be negligent and then to complain

Digitized by Google

of being deceived. But latent defects, i. e., those that are not discoverable by a reasonable examination do not fall within the purview of the rule of *caveat emptor* for the reason that as to such defects the vendor and vendee cannot be said to stand on equal ground the advantage being with the former. With respect to such matter false representations of the vendor will give the vendee a cause of action for the damages he sustains in instances wherein the following elements are combined: (1) That false representations of a material fact or facts were made by the vendor to the vendee with intent to deceive; (2) that the vendee believed the representations to be true and relied upon them and (3) that his reliance upon them was an act of ordinary prudence. [Phelps v. Jones, 141 Mo. App. 223, and cases cited.] The vendor's intent to deceive is an indispensable ingredient of the cause, but the existence of such intent may be inferred from representations of facts of which the vendor is ignorant but of which he assumes or professes to have knowledge. The recklessness of such representations is regarded as constituting a tort of equal culpability with that of intentional falsehood.

Applying these rules to the case in hand we conclude that the evidence of plaintiff tends to support his pleaded cause and that the court did not err in sending the case to the jury. We cannot say as a matter of law that a reasonable examination of the cow by plaintiff prior to the sale and under the circumstances of his situation would have disclosed the existence of the defects. The jury were entitled to indulge the inference that these defects were latent, that defendant made false representations concerning them either with the deliberate intent to deceive or ignorantly, but with reckless indifference to truth, and that plaintiff relied on these representations and acted on them believing them to be true.

Digitized by Google

In ruling on the instructions the court appears to have adopted the views of the case we have expressed with one exception. The jury were directed, in effect, to return a verdict for defendant unless they believed from the evidence that defendant had actual knowledge of the falsity of his representations. This was error. As we have stated actual knowledge of the vendor of the falsity of his statements of material facts is not an indispensable element of such tort. A false statement innocently but mistakenly made will not afford the vendee a cause of action, but a false statement recklessly uttered will imply a fraudulent intent which is the cornerstone of a cause founded on false and fraudulent representations. The instructions too greatly restricted the scope of plaintiff's cause and much as we dislike to remand a case involving an amount so small, we feel that plaintiff, not having had a fair trial, should not be deprived of that right. Accordingly the judgment is reversed and the cause remanded. All concur.

---

JOHN H. ROTH, Administrator of the Estate of ANNA GUCZMAN, Deceased, Respondent, v. CITY OF ST. JOSEPH, Appellant.

**Kansas City Court of Appeals, April 29, 1912.**

1. **PUBLIC NUISANCE: Damages: Stagnant Water.** A landowner has no right to collect surface water on his land and precipitate it in a body on the land of his neighbor, nor to collect and hold it in a stagnant, offensive and disease-breeding body and thereby inflict an injury to his neighbor.

2. **———: ———: Public Street.** Where a city suffers a nuisance to be erected in a public street and does not abate it within a reasonable time after the reception of knowledge of its existence, it becomes liable for the injurious consequences to the same extent as it would had it created the nuisance.

Digitized by Google

Appeal from Buchanan Circuit Court.—*Hon. William D. Rusk,* Judge.

AFFIRMED.

*W. E. Norris, O. E. Shultz* and *Phil A. Slattery* for appellant.

*Carolus & Wilcox* and *Perry A. Brubaker* for respondent.

JOHNSON, J.—This action was commenced in September, 1909, by Anna Guczman to recover damages from the city of St. Joseph, a city of the second class, on account of the erection and maintenance of a nuisance adjacent to her residence. The petition alleged the nuisance injured the health of the plaintiff and impaired the value of her property. During the pendency of the suit in the circuit court Mrs. Guczman died and thereafter the action was prosecuted by the administrator of her estate. The trial of the issues resulted in a verdict for the defendant but, afterwards, the court sustained the motion for a new trial filed by plaintiff on the ground of "error in giving instructions 1, 5 and 9, on behalf of the defendant and also because the verdict is against the weight of the evidence." Defendant appealed from this order and contends that the vital error committed by the trial court was in overruling the demurrer to the evidence.

The residence owned and occupied by Mrs. Guczman was near the intersection of Fifth street and Doniphan avenue in the city of St. Joseph. The locality is in an old part of the city and Fifth street (the course of which is north and south), for many years has been recognized by the city as one of its public streets. Some years ago a railroad company was granted the right to construct and maintain two tracks along the street and at the time of the events in controversy the

Digitized by Google

Chicago, Burlington & Quincy Railroad Company was operating two tracks under that franchise. This railroad greatly impaired, if it did not entirely destroy, the use of the street by vehicles and impaired, but did not entirely destroy its use by pedestrians. It is accurate to say the street was an accepted and recognized public street used chiefly by the railroad company. For many years a creek emptying into the Missouri river crossed Fifth street near the intersection of Doniphan avenue. This creek which carried only surface water ran near Mrs. Guczman's property. Some years ago the city made a new channel for carrying off the surface water leaving the old channel useless. After this, in 1907, the railroad company replaced a trestle spanning the creek on Fifth street with an embankment which dammed the old channel and caused the formation of a pond of surface water adjacent to plaintiff's property. Anticipating that surface water would collect in the reservoir thus formed the railroad company put an eighteen-inch pipe across the embankment near the bottom, but the evidence shows that the pipe was placed too high to drain the basin properly permitting the retention therein of a large body of surface water. Further it appears from the evidence of plaintiff that this drain was allowed to become choked by dirt and debris. Witnesses introduced by plaintiff say that the pond, which at the time of the trial had been in existence four years or more, was stagnant, extremely foul and, of course, injurious to the health of Mrs. Guczman and to the value of her property. Shortly after the construction of the embankment the city laid a drain consisting of sewer pipe twelve inches in diameter connecting the west end of the embankment drain with a sewer a block west of Fifth street. The evidence, we think, shows indisputably that this drain was sufficient to carry off all the water that flowed through the embankment pipe; in other words the existence of the pond was not due in any part to insufficiency of

Digitized by Google

the connecting drain laid by the city. The acts of the city which the petition charges resulted in the establishment and continuance of the nuisance are, first, the negligent manner in which the channel of the creek was diverted; second, the negligent construction of the embankment drain and, third, negligence in suffering the mouth of the drain to become and remain clogged. The first of these issues is abandoned by plaintiff and the demurrer to the evidence presents the question of whether or not plaintiff is entitled to go to the jury on the remaining two.

The gravamen of the action is nuisance—the creation and maintenance of a public nuisance, from which plaintiff suffered special injuries. Negligence is not an ingredient of such tort and our sole inquiry is confined to the subjects of whether or not the defendant city as an owner of real property erected an obstruction on its land that collected surface water which otherwise would have flowed away, and held it in a body to the special injury and damage of an adjoining proprietor. Though surface water is a common enemy which each proprietor must ward off as best he may, the rule is too well settled to require the citation of authorities that a landowner has no right to collect surface water on his own land and precipitate it in a body on the land of his neighbor, nor to collect and hold it in a stagnant, offensive and disease-breeding body and thereby inflict an injury to his neighbor. The obstruction placed across the bed of the creek in a way to dam up and hold the water was a nuisance. [Hedrick v. St. Joseph, 138 Mo. App. 396; Martin v. St. Joseph, 136 Mo. App. 316.] The cause of the obstruction and, therefore, the cause of the nuisance obviously was not the embankment itself but the emplacement therein of the drain-pipe in a manner to afford inadequate drainage. That was the act of the railroad company and we agree with defendant that it was the sole creator of the nuisance but we do not agree with counsel

Digitized by Google

for defendant that because the city did not build the dam of the drain it cannot be held liable for the injuries sustained by plaintiff. The whole structure was built in a public street over which the city had complete jurisdiction. As far as the rights of plaintiff are concerned the city was an adjoining proprietor who suffered a nuisance to be erected on his premises and failed to abate the nuisance after receiving notice of its existence. It was the duty of the city to abate the nuisance within a reasonable time after the reception of knowledge of its existence and in failing so to do it became liable for the injurious consequences to the same extent as it would be liable had it built the dam and drain. [Brown v. Scruggs, 141 Mo. App. 632; Sallee v. St. Louis, 152 Mo. 615; Donner v. Railway, 133 Mo. App. 527; Torpey v. City, 24 Mo. App. 288.]

There is nothing at variance with this view in the case of Hedrick v. St. Joseph, supra, on which defendant relies. We held in that case that the evidence disclosed the city had not accepted the street and, therefore, had not assumed jurisdiction over it, but in the present case the fact is not disputed that Fifth street was an accepted street and it is immaterial whether or not the city accepted the nuisance. By failing to remove it in a reasonable time after it had constructive knowledge of its presence, the city, in effect, did adopt it as its own work.

Counsel for defendant argue "if we assume, as contended by plaintiff, that the city made this pipe a part of its sewer system, still the city is not liable for the reason that the nuisance was not caused by the stopping up of the eighteen-inch pipe, but was due to the fact that the eighteen-inch pipe was too high at the east end to draw the water from the basin formed by the fill. The city cannot be held liable for a defect in plan. [Hays v. Columbia, 159 Mo. App. 431; Gallagher v. Tipton, 133 Mo. App. 557.]"

Digitized by Google

There is nothing in the evidence to justify the conclusion that the nuisance was caused by a defect in the general plan of building sewers and drains adopted by the city. The apparent cause of the whole trouble was the placing of the drain pipe in the middle instead of at the bottom of the embankment. It would be absurd to say that such construction was in obedience to a general plan or system of doing such work. The evidence before us does not show that the drain pipe was too small to carry off the water from the creek bed, nor does it show that the retention of water was due to any obstruction of the mouth of the drain. As we said before the nuisance was caused and maintained solely by the position of the pipe which rendered it inadequate to the task of draining the basin. Point is made that the action must fail because the railroad company was not made a party defendant. Plaintiff was not required by any general rule of law to join the railroad company and the statute invoked by defendant (section 8862, Revised Statutes 1909) does not apply to actions against cities of the second class.

The demurrer to the evidence was properly overruled and since one of the grounds on which a new trial was granted is that the verdict is against the weight of the evidence, we must affirm the judgment. It is so ordered. All concur.

---

## JOHN PARKER, Respondent, v. MISSOURI, PACIFIC RAILWAY COMPANY, Appellant.

**Kansas City Court of Appeals, April 29, 1912.**

**RAILROADS: Personal Injury: Evidence.** Three employees were engaged in repair of a railway track by cutting off a part of an iron splice fourteen inches long and four inches wide, with a chisel and maul. Plaintiff held one end of the splice on an iron surface, while one of his companions held the other end with one hand and the chisel with the other, while the remaining man struck with the maul. The man holding the

Digitized by Google

chisel allowed his attention to be drawn from it by looking away and this caused the chisel to become unsteady, which caused the maul to hit it in a glancing way and to be deflected onto plaintiff's hand, cutting off his thumb. It was held that plaintiff had a cause of action.

Appeal from Buchanan Circuit Court.—*Hon. William D. Rusk,* Judge.

AFFIRMED.

*Robert T. Railey* and *Ben J. Woodson* for appellant.

*Mytton & Parkinson* for respondent.

ELLISON, J.—Plaintiff is an employee of defendant and his action is for personal injury inflicted by one of defendant's other servants. The verdict was for plaintiff in the sum of $1500, of which $500 was remitted and judgment entered for $1000.

It appears that plaintiff and two other servants of the defendant railway company were engaged in repairing the track by cutting off the corner of the shoulder of an iron splice about fourteen inches long, four inches wide at one end and three at the other. It was used as a brace or support in holding the rails. The cutting was done with a maul and chisel by laying the splice on an iron rail, plaintiff holding one end and one of his companions holding the other end with one hand and the chisel with the other, while the other companion struck the chisel with the maul. Plaintiff's case is founded on the charge that the companion holding the chisel became inattentive, looked away and allowed the chisel to "wobble" or become unsteady, whereby the descending maul struck it a glancing blow, causing the maul to deflect and strike plaintiff's hand, cutting or mashing off his thumb.

The evidence in plaintiff's behalf tended to support what we have stated and thereby made a case for

Digitized by Google

the jury. Defendant endeavors to show the injury resulted from a mere accident in the work; saying that the "accidental tremor" of the man's hand, by reason of holding the chisel too long, caused the unsteadiness of the chisel and the consequent glancing lick with the maul. But there was other evidence which, since the verdict of the jury, we must believe to be true, to the effect that at the time of the moving of the chisel the man holding it was looking away. The man himself denied this, but we must accept the other statement. The jury had a right to attribute plaintiff's misfortune to that man's negligence, and the court, of course, had no right to say, as a matter of law, that there was no negligence.

Objection is made to plaintiff's first instruction in that it is argumentative and does not confine the negligence submitted therein to that charged in the petition. The objection is not well taken. It is properly drawn. It is true the petition charges negligence in holding the chisel and in striking with the maul, while the instruction is confined to the negligent holding of the chisel alone. Plaintiff was not compelled to submit all acts of negligence charged—some may be abandoned and some not proved and yet those having evidence to support them may be submitted.

The man who held the chisel was a witness for defendant, and on cross-examination he was asked if his act in letting the chisel "wobble" had not caused the maul to glance and strike plaintiff's hand. No objection was made to the question until after it was answered, which, of itself, is enough to cut out objection. The objection was that it called for a conclusion; but we think, coming in the connection it did and being on cross-examination, it was properly allowed.

We have no fault to find with the authorities cited by defendant, especially 1 White Personal Injuries on Railroads, secs. 390, 391 and 344, 345, but we do



Digitized by Google

not think them applicable to the facts as made to appear by plaintiff's testimony.

Since the plaintiff's remittitur, we can see no objection to the amount of the judgment. Finding ourselves without right to interfere, we affirm the judgment. All concur.

---

CHARLES H. MOORE, Administrator, Respondent, v. MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 13, 1912.

1. **CARRIERS: Passenger: General Negligence: Inference.** Where a passenger brings an action against a carrier for personal injury alleging negligence in these words: "The defendant carelessly and negligently operated said train in such manner that the train of cars left the track," etc., it was *held* to be a general charge of negligence and that the plaintiff need go no farther than to show the derailment and injury, the law raising an inference of negligence.

2. **EVIDENCE: Expert: Force of Question.** A hypothetical question propounded to a physician as an expert, under the rulings of the Supreme Court may ask if certain supposed facts "might, could or would" produce the result stated.

Appeal from Jackson Circuit Court.—*Hon. James H. Slover,* Judge.

AFFIRMED.

*White & Lyons* for appellant.

(1) The petition alleged specific negligence on the part of the defendant, and no proof of any negligence was made. For this reason the demurrer to the evidence should have been sustained. Roscoe v. Railroad, 202 Mo. 576; Orcutt v. Building Co., 201 Mo. 442; McGrath v. Transit Co., 197 Mo. 457; Morgan v.

Digitized by Google

Mulhall, 214 Mo. 457; Ely v. Railroad, 77 Mo. 34. (2) The court committed reversible error in giving the instruction asked by the plaintiff, for the reason that she had waived the presumption of negligence, arising from the allegation of general negligence and proof of derailment, by pleading specific negligence. Roscoe v. Railroad, 202 Mo. 576; Orcutt v. Bldg. Co., 201 Mo. 442; McGrath v. Transit Co., 197 Mo. 457; Morgan v. Mulhall, 214 Mo. 457; Ely v. Railroad, 77 Mo. 34. (3) The court erred in refusing defendant a continuance on the ground of surprise. Alt v. Groseclose, 61 Mo. App. 410; Shoe Co. v. Hilig, 70 Mo. App. 308. The action of the court in construing the specific allegation of negligence in the petition, to be general, was tantamount in permitting plaintiff to so amend her petition that the burden of proving no negligence was thrown upon the defendant. Punstall v. Hamilton, 8 Mo. 500. (4) The court committed error in permitting Dr. Burnett, in answering a hypothetical question, to give his conclusion instead of his opinion. Roscoe v. Railroad, 202 Mo. 594; Taylor v. Railroad, 185 Mo. 239.

*Boyle & Howell* for respondent.

(1) The petition does not allege specific negligence. The language is broad and general and is more strictly drawn than defined in the leading case on the subject- to-wit: Mallory v. Railroad, 173 Mo. 82. It is unnecessary that we should follow and discuss the long line of cases, and we will here cite only some of the leading and principal cases, and we may say that the Mallory case is still the typical case as to the doctrine of pleading a derailment in a passenger case. The whole argument of counsel is met by the passage quoted supra. The counsel for defendant say, "of course if the petition had alleged that a derailment was caused by the negligence and carelessness of the agents, servants and employees of defendant, this

Digitized by Google

would have been an allegation of negligence in general terms." Bowlin v. Railroad Co., 125 Mo. App. 419; Hyde v. Transit Co., 102 Mo. App. 537; Estes v. Railroad, 110 Mo. App. 725; Condy v. Railroad, 85 Mo. 79; McDonald v. Railroad, 219 Mo. 468; Chlander v. Transit Co., 213 Mo. 244.

ELLISON, J.—This is an action for personal injury alleged to have been received by plaintiff's intestate, Miss Tanner, while a passeger on one of defendant's trains. The judgment in the trial court was for the plaintiff. After the rendition of the judgment Miss Tanner died and the action was revived in plaintiff's name, though for convenience we will designate her as the plaintiff.

It appears that she was a physician and traveled around to several towns in Kansas in the practice of her profession. That while on one of defendant's trains, the car in which she and six men passengers were sitting, became derailed and ran for a short distance on the ties, when it was partly tipped to one side and stopped. Plaintiff testified that she was thrown against the arm of the seat, or seats, in such way as to sprain, or break, bones in her wrist, and that she struck the extreme end of her spine and the lower part of her abdomen against the arms of the seats with such violence as to cause such serious and painful injuries as to bring on permanent bodily disorders and nervous derangements, resulting in great change in appearance and in partial physical as well as mental disability

No special negligence was proved, the plaintiff insisting that it need not be, since the charge was general; while defendant contends it was special and not being proved, its demurrer to the evidence should have been sustained. The charge set out in the petition is that "The defendant carelessly and negligently operated said train in such manner that the train of cars left the track." If this was a general charge, then

Digitized by Google

plaintiff need go no further than to show the derailment and injury as the law will raise an inference of negligence. If the charge is specific, then she should have shown it by the testimony; and herein lies the importance of the controversy on this point. We conclude with the plaintiff that the charge is of general negligence. [Malloy v. Railroad, 173 Mo. 75; Chlanda v. Transit Co., 213 Mo. 244; MacDonald v. Railroad, 219 Mo. 468.]

A lengthy hypothesis was stated to a physician, who was put upon the stand by defendant as an expert. It concluded with this question:

"Q. Doctor, state whether or not, in your opinion, there might, could or *would* have been any connection between the blows that she received upon her body as I have described them to you, and the pain that she suffered at the base of the brain and along the spinal column and at the tail of the spinal column, the sleeplessness of nights, the nervousness; the question is whether or not there *would* be any connection, might could or *would* be any connection between those things? A. Yes, sir."

The objection made in this court is to the word "would" in the question; it being claimed that that word called for a conclusion of fact from the witness, the determination of which should have been left to the jury. An examination of the record shows several questions were put before the word "would" was used, and objections were made, and that finally when that word was introduced as shown in the question quoted, an objection was made but it did not include the use of that word. So the trial court's attention was not called to that phase of the objection and it is really put forward in this court for the first time, and for that reason alone should be overruled.

But, aside from this, the form of question including the word "would," was stated with approval in Taylor v. Railroad, 185 Mo. 239, and that part of the

Digitized by Google

case thus stating a form of question was afterwards quoted with approval by the Supreme Court in State v. Hyde, 234 Mo. 200. We have had occasion to say, in Holtzen v. Railroad, 159 Mo. App. 370, that the approval of the Taylor case should be regarded as closing the matter of propriety of the question in this court.

What we have said practically covers other objections, including the matter of continuance, in which we discover no ground for complaint.

Nor do we feel it would be proper to pronounce the verdict of $5000 as excessive. If the evidence in plaintiff's behalf is true, and we must so regard it, the serious and permanent injury so affected her body and mind as to practically destroy any pleasure in life.

Discovering no error justifying a reversal, we affirm the judgment. All concur.

---

## HENRY JENKINS, Respondent, v. GEORGE W. WOMACH, Appellant.

**Kansas City Court of Appeals, May 13, 1912.**

2. **EVIDENCE: Hypothetical Question: Expert: Rental Value: Farmer.** A farmer residing in the vicinity of a tract of land and acquainted with rental values, is competent to state the rental value of such tract. Such interrogation does not involve or embrace what is known as a hypothetical question propounded to experts.

2. **———: Res Adjudicata: Lease: Former Appeal.** Though an appellate court may decide that a certain alleged verbal contract, as testified to by the plaintiff, was a valid lease, yet on a retrial the question whether such verbal contract was, in fact, made, is open for testimony on both sides of the issue, and it is error to refuse to let defendant testify in denial on the ground that it is *res adjudicata* by the former appeal.

Digitized by Google

Appeal from Buchanan Circuit Court.—*Hon. George L. Zwick,* Special Judge.

REVERSED AND REMANDED.

*Charles C. Crow* for appellant.

*George W. Eastin* for respondent.

ELLISON, J.—This action is for damages based upon an alleged violation of an agreement for the rent of a small farm in Buchanan county. The judgment in the trial court was for plaintiff.

The renting was without writing and for more than one year, being from the first of November, 1904, to the first of March, 1906. But plaintiff was put in possession and so remained for several months, without objection, and this court held, in an action between these parties wherein Womach sought to recover possession from Jenkins, that the tenancy was good for one year (128 Mo. App. 408). The present action was afterwards begun by Jenkins, in which he recovered a judgment for damages in the trial court, which was afterwards reversed in this court on account of error in instructions, and remanded for a new trial, with suggestions that an amended petition be filed. The petition was amended in accordance with the suggestions of this court, and the cause again tried, with the result again for plaintiff, as stated.

On the former appeal this court stated in an opinion by Judge BROADDUS, that the measure of damages would be the rental value of the premises over and above the rent he was to pay. In proof of this, plaintiff called several witnesses, chiefly farmers who lived in the neighborhood of this land and who knew the rental value thereof. One was a banker, but he owned lands in the neighborhood and had experience in renting. Defendant objected to these on the ground that no hy-

Digitized by Google

pothetical facts were propounded to them as experts. The questions asked of these witnesses were not the character of questions referred to by defendant in his objections. These were not hypothetical questions based on supposititious facts. These were straight questions of rental value addressed to men who knew. We rule the point against defendant.

And so of the objection to the amended petition. It was in substantial compliance with the ruling made by this court when the case was here before.

But a ruling was made at the trial which cut out defendant's defense except as to the amount of plaintiff's recovery. Defendant denied, as a matter of fact, that he ever rented the land to plaintiff, and yet, singular to say, objection was made to his testifying that he had not and the objection was sustained. Judging from the brief of counsel this objection was founded on the decision of this court that the lease was a valid one. We did decide that a verbal lease or renting of a certain kind for a certain named time, was a valid one as a legal proposition. But we did not, and could not, decide the question of fact that such a renting had in reality been made. When the case was reversed and remanded for a new trial it was, of course, still incumbent upon the plaintiff to develop a state of evidence which, if believed by the jury after hearing the other side, would entitle him to a verdict. As this case was tried, plaintiff was allowed to testify to the verbal renting and terms thereof, in detail, whereas defendant was cut short off without the privilege of a word of denial that the things stated by plaintiff ever occurred. Our decision was that the verbal agreement, if made, was binding, notwithstanding the Statute of Frauds; but not that a verbal agreement was, in fact, entered into.

It is to be regretted that this protracted litigation must continue, but we cannot, of course, deny to one

Digitized by Google

party the right to show his side of an issue upon which the other party testified at length.

The judgment is reversed and the cause is remanded. All concur.

---

## JOHN A. SHOWEN, Administrator of the Estate of CYRUS C. ARMSTRONG, Deceased, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

**Kansas City Court of Appeals, May 27, 1912.**

1. **NEGLIGENCE: Death of Plaintiff: Abatement of Action.** Plaintiff sued for damages for injuries received when thrown from the rear of a street car by the sudden starting of the car as he was about to alight therefrom at a regular stopping place. The case was partially tried and continued. Thereafter plaintiff died and the cause was revived in the name of the administrator, who filed an amended petition which did not contain any allegation that the death of his intestate did not result from the injury. *Held*, that such an allegation was indispensable to his right to continue the suit.

2. ———: ———: ———. The statute, Sec. 5438, R. S. 1909, being in derogation of the common law, must be strictly construed and the burden is on the administrator to establish by proof his right to maintain the action.

3. **Evidence: Death of Witness: Stenographer's Notes.** Where the party against whom is offered evidence of the testimony given by a witness at a former trial, had the opportunity of confrontation and cross-examination, the evidence is competent, first, in instances where the witness is dead; second, where he is insane or mentally incapacitated; third, where he is beyond seas; and fourth, where he has been kept away by the connivance of the opposite party.

Appeal from Jackson Circuit Court.—*Hon. James E. Goodrich*, Judge.

REVERSED AND REMANDED.

Digitized by Google

*John H. Lucas* and *Boyle & Hogsett* for appellant.

(1) The cause of action was not shown to have been one which could survive the death of the original plaintiff, Armstrong. Elliott v. Kansas City, 210 Mo. 576; Millar v. Transit Co., 216 Mo. 99, 104; Behen v. Transit Co., 186 Mo. 430, 445; Bates v. Sylvester, 205 Mo. 493; R. S. 1909, Sec. 106; Vawter v. Railroad, 84 Mo. 679; Oates v. Railroad, 104 Mo. 514; Strottman v. Railroad, 211 Mo. 227. (2) The defendant's demurrer to plaintiff's evidence, which was also renewed at the close of all of the evidence, should have been sustained. Scroggins v. Railroad, 138 Mo. App. 215; Gurley v. Railroad, 104 Mo. 233; Nugent v. Milling Co., 131 Mo. 253; De Maet v. Storage Co., 121 Mo. App. 104; Stafford v. Adams, 113 Mo. App. 721; Barnard v. Railroad, 137 Mo. App. 684. (3) The court erred in admitting the transcript of the stenographer's notes of Armstrong's former testimony. Byrd v. Hartman, 70 Mo. App. 57; Dempsey v. Lawson, 76 Mo. App. 522; Sevier v. Allen, 80 Mo. App. 187; Craig v. Scudder, 98 Mo. 664.

*E. E. Aleshire, John S. Showen* and *R. S. Robertson* for respondent.

JOHNSON, J.—On March, 6, 1908, Cyrus C. Armstrong commenced this suit in the circuit court of Jackson county to recover damages for personal injuries he alleged were caused by the negligence of defendant. The injury occurred October 16, 1907, and the petition alleged that it was caused by the negligence of defendant in suddenly starting a street car which had been stopped at a regular place for the reception and discharge of passengers while the plaintiff was in the act of alighting. The answer was a general denial. There was a trial of the cause in March, 1909, at which plain-

Digitized by Google

tiff appeared both as a party and as a witness. For some reason, not important now, that trial did not result in a judgment and the cause was set for retrial. On August 25, 1909, while the cause was pending the plaintiff died and on the 25th day of September following the court entered an order reviving the cause in the name of the administrator of his estate and thereafter the action was prosecuted by the administrator as plaintiff. An amended petition was filed by the administrator which repeated the allegations of the original petition respecting the cause of action and in addition alleged the facts of the death of Armstrong, the appointment of the administrator and his substitution as plaintiff. The amended petition contained no averment that the death of Armstrong did not result from the injury caused by the pleaded negligence. Defendant did not attack the amended petition by demurrer but filed an answer in the nature of a general traverse.

At the trial counsel for defendant objected to the introduction of any evidence on the ground "that the petition does not state a cause of action, because under the common law an action for personal injury did not survive the death of the injured party and because the statute under which this is sought to be revived only revives a certain class of cases and there is no plea or allegation in this petition that shows that the case falls within that class." The objection was overruled, defendant excepted and the court proceeded with the trial.

The principal evidence introduced by plaintiff was the testimony of Armstrong given at the former trial. Plaintiff introduced as a witness the official stenographer of the circuit court who reported that trial and he testified that he took the testimony in shorthand and had with him a transcript of his notes. He was interrogated by counsel for defendant as follows: "You have no independent recollection of what Mr.

Digitized by Google

Armstrong testified to, have you, Mr. Jetmore? A. Only some portions of it. Q. Of course you sometimes make mistakes in transcribing? A. Very frequently, but not any more so than the rest of them. Q. But that is as near correct as usual under similar circumstances? A. Yes, sir, I presume it is. There may be some typographical errors or small errors but I tried to make it correct. Q. You would not say on your oath that the transcript you have been shown is a literal reproduction of the testimony of Mr. Armstrong, would you? A. Pretty near. Q. But not absolutely so? A. Yes, I guess it is a transcript of the testimony, Mr. White. Of course, I do make mistakes, but I took his testimony and I think I got it all."

Plaintiff then attempted to have the witness testify from memory to the testimony given by Armstrong by using the transcript of his notes to refresh his memory, but this method of examination was not successful and over the objections of defendant the court finally permitted plaintiff to introduce the transcript in evidence. The ground of the objection thus was stated by counsel: "Because it is hearsay evidence and because there is no provision, either of the common law or of the statutes, authorizing the reading of such a transcript as the evidence of a witness and because it is incompetent, irrelevant and immaterial."

The facts of the injury as stated in the transcript thus may be stated: Mr. Armstrong, a Presbyterian minister living at Stanberry, was attending a synod at Kansas City and was on his way from a meeting of the synod to his lodgings at the time of his injury. He became a passenger on a southbound Rockhill car operated by defendant intending to alight at Thirty-fourth and Main streets, a regular stopping place. He was a stranger in Kansas City and was not familiar with its streets. He sat in a rear seat next to the vestibule where the conductor stood when not engaged

Digitized by Google

in collecting fares and when the car stopped at Thirty-fourth street he asked the conductor who was in the vestibule if that was Thirty-fourth street and receiving an affirmative answer arose from his seat and proceeded to alight. He testified: "The door was ajar and I stepped to the doorway and across the vestibule and I had one foot on the step and the other extended to step to the pavement and the car lurched forward and threw me to the pavement." The car was headed south and Mr. Armstrong in going down the steps to the pavement was facing west. He states that he was not holding to a handhold and that the sudden motion of the car threw him in such manner that he fell to the pavement with his head to the west and his body extended in an east and west direction.

The principal injury he sustained was a fracture of the ball and socket joint in the left hip. The evidence of defendant is to the effect that Armstrong came out of the car to the vestibule, proceeded down the steps and attempted to step to the pavement, all before the car had reached the stopping place and while it was running at a speed of three or four miles per hour.

The injury was very severe and plaintiff suffered pain and was lame from it to his death. He was in good health before the injury and thereafter his health seemed steadily to decline until he died.

The specific cause of his death is not shown but a very strong inference arises from the evidence that the injury was the cause. The opposite inference also might be drawn and the issue of the causal relation of the injury to the death appears from all the evidence as a question of fact. At the request of plaintiff the jury were instructed: " . . . that if you believe and find from the evidence that on the 16th day of October, 1907, C. C. Armstrong, deceased, and former plaintiff in this case, was a passenger on one of defendant's cars proceeding southward on Main street

Digitized by Google

in Kansas City, Missouri, and that said car stopped at a point on said Main street, for the purpose of allowing plaintiff to alight therefrom, and that said place was a point where defendant was accustomed to stopping its cars for the purpose of taking on and letting off passengers; that while said car was so stopped, the said C. C. Armstrong, deceased, started to alight therefrom, and while in the act of alighting from said car, and before he had reasonable time within which to alight, defendant, by its agents and servants, suddenly and without warning, started its said car forward, thereby throwing the said C. C. Armstrong, deceased, to the pavement and injuring him while the deceased was at the time in the exercise of ordinary care for his own safety, then your verdict will be for plaintiff.

"By 'ordinary care' as used in the above instruction is meant such care as an ordinarily prudent person would exercise under like circumstances."

The jury returned a verdict for plaintiff in the sum of five thousand dollars and after its motions for a new trial and in arrest of judgment were overruled, defendant appealed.

I. Under the common law an action for personal injuries did not survive the death of the injured plaintiff and both the cause and an action to enforce it abated on his death occurring before the cause had merged into a judgment. [Elliott v. Kansas City, 210 Mo. 576; Millar v. Transit Co., 216 Mo. 99; Behen v. Transit Co., 186 Mo. 430; Bates v. Sylvester, 205 Mo. 493.] Therefore the right of the administrator to be substituted as plaintiff and to prosecute to judgment the action begun by his intestate if it exists at all, exists by virtue of some statute in derogation of the common law. It cannot be founded on section 105, Revised Statutes 1909, since the section following expressly excludes from the operation of that statute ac-

Digitized by Google

tions for injuries to the person of the plaintiff. Nor can it derive its existence from sections 5425 or 5426, since those sections deal only with cases where the death of the injured person resulted from an injury negligently inflicted by the defendant. It must rest, if at all on Section 5438, Revised Statutes 1909, enacted in 1907 (Laws 1907, p. 252) which provides:

"Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries, other than those resulting in death, whether such injuries be to the health or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both such parties, such cause of action shall survive to the personal representative of such injured party, and against the person, receiver or corporation liable for such injuries and his legal representatives, and the liability and the measure of damages shall be the same as if such death or deaths had not occurred."

This section does not apply to instances where the death of the injured person resulted from his injury nor to cases where the death was not caused by the injury but occurred before an action was commenced to recover damages on account thereof. In express language it applies only to actions pending at the time of the death of the plaintiff to recover damages for personal injuries which were not the cause of the death. In such cases the death of the plaintiff does not abate the action nor its cause but both survive to the personal representative of the deceased and such representative is entitled to be substituted in the action as plaintiff.

Of course the administrator has no right to be made plaintiff and to continue the action in his name if the death of his intestate resulted from the injury that created the cause of action. Being in derogation of the common law the statute must be strictly con-

Digitized by Google

strued and the burden is on the administrator to estab lish by proof his right to maintain the action under the statute. To do that he must show affirmatively that the death of his intestate was not caused by the injury. The same rule applies to all of the damage statutes in derogation of the common law, i. e., that the right to sue or to maintain an action must be shown by the one who asserts that he has such right.

Reference to two cases on this point decided in this state will suffice. In Barker v. Railroad, 91 Mo. 86, an action on what is now section 5425, Revised Statutes 1909, was before the Supreme Court. We quote from the opinion: "It may be observed that damages for a tort to the person, resulting in death, were not recoverable at common law, nor could husband or wife, parent or child, recover any pecuniary compensation therefor against the wrongdoer. Our statute, on this subject, both gives the right of action and provides the remedy, for the death, where none existed at common law, and where an action is brought, under the statute, it can only be maintained subject to the limitation and conditions imposed thereby. In conferring the right of action, and in providing such remedy, in designating when, and by whom, suits may be brought, it was, as a matter of course, competent for the Legislature to provide and impose such conditions as it might deem proper, and the conditions thus imposed modify and qualify the right of recovery, or form, rather, we think, a part of the right itself, and upon which its exercise depends."

And further it is said: "In statutory actions of this sort, the party suing must bring himself strictly within the statutory requirements, necessary to confer the right, and this must appear in his petition; otherwise, it shows no cause of action."

In Dulaney v. Railway, 21 Mo. App. l. c. 599, this court, speaking through ELLISON, J., said: "The right of action given by sections 2121 and 2122, Revised Stat-

Digitized by Google

utes, is statutory. It did not exist at common law. Being created by the statute, one who sues must bring himself within the statutory terms. [McNamara v. Slavens, 76 Mo. 329.] The right of action in this case belongs to the father and mother in the event that there is no wife. The language of the statute is 'if such deceased be a minor and unmarried, then' the action inures to the father and mother. The principle announced in Barker v. Railroad, Supreme Court of Missouri, not yet reported, fully sustains this view."

Those decisions do not deal with actions pending at the death of the injured plaintiff and, consequently, do not touch the question that might arise in such cases of whether or not the administrator on being made plaintiff must file an amended petition alleging the constitutive elements of his right to prosecute the action but they are declarative of the rule that the burden is on him to establish by evidence the existence of such constitutive facts since he must, at all stages of the action, maintain his right to prosecute it to judgment. In the present case, the administrator relieved us of the duty of deciding the question we have just mentioned by voluntarily filing an amended petition. By so doing he abandoned the original petition and assumed the burden of pleading not only the elemental facts of the cause of action but also the facts on which depended his right to prosecute the action. In omitting to allege that the death of his intestate did not result from the injury he failed to allege a fact indispensable to his right to continue the suit. The defect was not cured by answer and could be made the subject of an objection to the introduction of evidence.

And further we find that the instruction of plaintiff which assumed to cover the whole case and to direct a verdict was erroneous in failing to submit the issue of whether or not the death of Armstrong was the result of his injury.



Digitized by Google

II. Next it is urged by defendant that the court erred in admitting in evidence the transcript of the testimony of Armstrong given at the former trial. The transcript was written by the court stenographer from his shorthand notes of the testimony and the stenographer testified that the notes were full and accurate and that the transcript was a true translation of them. He admitted there might be trivial typographical errors in the transcript such as might creep into any stenographic report however carefully taken, but the sum of his testimony is that the transcript contained a faithful and accurate reproduction of the testimony.

In Byrd v. Hartman, 70 Mo. App. 57, a case where the witness at the former trial was alive at the trial in question, we said: "We know of no authority that would authorize the reading in evidence by the official stenographer of a court his notes of the testimony of a party taken at a former trial of a case; and especially so where the party is alive and present in court. If the plaintiff made declarations or admissions in his testimony at the former trial of the kind shown by the stenographer, these, on laying the proper foundation therefor, could be proved by the testimony of the stenographer or that of any other person who heard them."

To the same effect were the later decisions of this court in Dempsey v. Lawson, 76 Mo. App. 522, and Sevier v. Allen, 80 Mo. App. 187. These cases may be distinguished from the case in hand on the ground, if on no other, that in each of them the witness was alive at the time of the last trial and his testimony was procurable, while here, the witness was dead at the time of the last trial and the only accurate evidence of his testimony obtainable was in the notes of the court stenographer.

In Estes v. Railway, 111 Mo. App. 1, this court in an opinion by Judge BROADDUS, held that the stenographer's notes of the testimony of witnesses taken at

Digitized by Google

a former trial were admissible to contradict the testimony of the same witnesses at a subsequent trial and that the testimony of jurymen offered to contradict the witnesses was not admissible for the reason that the stenographer's notes were the best evidence. We quote from the opinion: "Defendant contends that the best evidence of what these witnesses testified to was a transcript of the stenographer's notes taken at the time. We are cited to the case of Padgitt v. Railway, 159 Mo. 143; but that case does not decide the question. All that the court does say in that respect is: 'The purpose of having the testimony taken down in shorthand is to preserve it for future reference after a period has elapsed during which it might not be so well remembered,' etc. In Bradley v. Spickardsville, 90 Mo. App. 416, it was held by this court that the stenographer's notes were more accurate and reliable than the memory. And that case is not in conflict with the Padgitt case, supra, where the court held that it was error to have the stenographer's notes taken at the trial in progress read to the jury.

"It seems to us that the stenographer's notes were the best evidence of what the three witnesses testified to at the trial of the other cause. Formerly there was no other mode of contradicting a witness in that respect. But since the adoption of the statute providing for shorthand notes to be made of the evidence during the trial of a case, the former method becomes secondary in its character, because less reliable. It was, therefore, error to admit the secondary evidence when the best evidence was procurable."

The rule that has the support of the great weight of authority is this: Where the party against whom is offered evidence of the testimony given by a witness at a former trial had the opportunity of confrontation and cross-examination, the evidence is competent, first, in instances where the witness is dead; second, where he is insane or mentally incapacitated;

Digitized by Google

third, where he is beyond seas; and, fourth, where he has been kept away by the connivance of the opposite party. And the best evidence of the testimony of such witness is the notes of the court stenographer when properly vouched for by the testimony of the stenographer. The stenographer is one of the legal officers of the court under oath to perform his duties faithfully. The same presumption of right acting applies to him as to other public officers and where he vouches under oath to the accuracy of his notes and of his translation it would be absurd to hold that the memory of witnesses who heard the testimony would be better evidence than the stenographer's notes when common observation and common sense would declare this is not so.

We find a most exhaustive discussion of this subject in Robertson v. State, 142 S. W. (Tex.) 533, and refer to that case and especially to the authorities reviewed in the opinion for a more comprehensive expression of our own views. Our conclusion is that the transcript was properly admitted.

III. We do not agree with the contention of defendant that "the plaintiff's evidence is so at war with the conceded physical facts as to lack all probative force." It is the idea of counsel that as Armstrong was not holding to a handhold while stepping from the car his fall, as he described it, could not have been produced by a forward lurch of the car. The principal case relied on to support this contention is one decided by this court, viz., Scroggins v. Railway, 138 Mo. App. 215.

The difference between the physical facts of the two cases is apparent. We do not decide such cases on the physical facts except where it clearly appears that the plaintiff's version of the injury could not be true. We shall not weigh the evidence nor balance probabilities or possibilities. Wherever the inference

Digitized by Google

is permissible that the injury occurred in the manner claimed by the plaintiff, an issue of fact is made for the jury to determine. We see nothing unreasonable in the testimony of Armstrong and hold that it was sufficient to take the pleaded issue of negligence to the jury.

We find no other error in the record than that noted in the first paragraph of the opinion. The judgment is reversed and the cause remanded. All concur.

---

## SIGEL E. SMITH, Appellant, v. BEATRICE M. SMITH, Respondent.

**Kansas City Court of Appeals, May 27, 1912.**

**DIVORCE: Fraud and Deceit: New Trial.** Plaintiff obtained a decree of divorce, the defendant not appearing, although she had filed an answer and cross-bill. Within four days and at the same term she filed a motion to set aside the decree on the ground of fraud and deceit practiced on her by plaintiff by which she was prevented from appearing at the trial. Plaintiff filed a plea to the jurisdiction of the court. The court sustained defendant's motion and granted a new trial. *Held*, that defendant's motion was, in effect, one for a new trial and not a petition for review.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*, Judge.

AFFIRMED.

*H. H. Blanton* for appellant.

*Hughes & Whitsett* for respondent.

JOHNSON, J.—July 26, 1910, plaintiff instituted a suit for divorce in the circuit court of Jackson county alleging facts which, if true, would entitle him to a

Digitized by Google

decree. August 5, 1910, defendant filed an answer putting in issue the allegations of the petition and also a cross-bill alleging facts which, if true, would entitle her to a divorce. March 3, 1911, plaintiff filed his reply and on March 23, 1911, the cause came on for hearing and the following decree was rendered:

"Now, on this 23d day of March, 1911, this cause coming on regularly for hearing, the plaintiff appearing in person and by attorneys H. H. Blanton, C. B. Adams, and the defendant, although duly summoned, not appearing either in person or by attorney, and this cause being submitted to the court on the pleadings and evidence, the court having duly considered the same, finds all the issues arising under the petition, and defendant's cross-bill and plaintiff's reply thereto, for the plaintiff and against the defendant, and that plaintiff is the innocent and injured party and entitled to be divorced from defendant, and the court, with the consent of the plaintiff, further finds that defendant is entitled to have her former name, Beatrice M. Mitchell, restored to her.

"Wherefore, it is by the court ordered, adjudged and decreed that the bonds of matrimony heretofore existing between plaintiff and defendant be and the same are hereby forever dissolved, and that defendant's former name, Beatrice M. Mitchell, be restored to her, and that all costs of this cause be taxed against defendant, and that execution issue therefor."

Two days after this decree was rendered and at the same term of court defendant filed a motion designated a "motion to set aside decree of divorce" in which she asked that a new trial be granted on the ground of fraud and deceit practiced on her by plaintiff by which she was prevented from appearing at the trial and presenting her side of the case. The facts alleged, if true, show that she was the innocent victim of a palpable fraud. Plaintiff filed a "plea to the jurisdiction of the court" which, treating defendant's mo-

Digitized by Google

tion as a petition for review of a judgment attacked the jurisdiction of the court to entertain the motion on the ground that section 2381, Revised Statutes 1909, prohibits the trial court from setting aside a judgment for divorce on petition for review.

The court heard these motions April 8, 1911, and entered an order and judgment sustaining defendant's motion and granting a new trial. A motion to set aside this order then was filed by plaintiff and was overruled and an appeal, was allowed plaintiff April 8, 1911. All of these proceedings were had at the term at which the judgment for divorce was rendered.

The purpose and function of section 2381, Revised Statutes 1909, are explained in the cases cited in the brief of plaintiff. [Smith v. Smith, 20 Mo. l. c. 170; Childs v. Childs, 11 Mo. App. 395; Salisbury v. Salisbury, 92 Mo. 683; Nave v. Nave, 28 Mo. App. 505; Hansford v. Hansford, 34 Mo. App. 262; Richardson v. Stowe, 102 Mo. l. c. 44; Smith v. Smith, 48 Mo. App. 612; Cole v. Cole, 89 Mo. App. 228; Elliott v. Elliott, 135 Mo. App. 42; Lieber v. Lieber, 239 Mo. 1, 143 S. W. Rep. 458; Dorrance v. Dorrance, pending Supreme Court Mo.] And if defendant's motion should be regarded either in form or substance as a petition for review we would hold that the trial court was without jurisdiction to entertain it. But there is nothing in this statute nor in any of the cases relied on by plaintiff to prevent the defeated party in a divorce suit from attacking the judgment by motion for a new trial and, if such motion is overruled, from prosecuting an appeal. Indeed, section 2380, Revised Statutes 1909, contemplates that an appeal may be taken in divorce causes as in others, subject only to the restriction that the appeal must be granted during the term at which the judgment or order appealed from was rendered. Section 2022, Revised Statutes 1909, provides:

"In every case where there has been a mistake or surprise of a party, his agent or attorney, or a misdi-

Digitized by Google

rection of the jury by the court, or fraud and deceit practiced by one party on the other, or the court is satisfied that perjury or mistake has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by any such matters, and that the party has a just cause of action, or of defense, it shall, on motion of the proper party, grant a new trial, and, if necessary, permit the pleadings to be amended on such terms as may be just."

The motion filed by defendant, in effect, was a motion for a new trial. It was filed in the time required by statute (Section 2025) and alleged one of the grounds specified in section 2022, viz., "fraud and deceit practiced by one party on the other"—in this case fraud and deceit practice by plaintiff on defendant.

There is no merit in the appeal and the judgment is affirmed. All concur.

---

REGINA GABRIEL, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 27, 1912.

1. **NEGLIGENCE: Pleading: Specific Acts.** Where specific acts of negligence are alleged, the burden of proof is upon the pleader to show that the injury was caused by the negligence averred and the instructions must restrict the right to recover to the pleaded cause.

2. **———: Degree of Care: Instructions.** Where the petition in a case of a passenger against a common carrier pleads specific acts of negligence, it is error to direct a verdict for plaintiff on the finding of the jury that the injury was caused by the negligent failure of the defendant to exercise the highest practicable degree of care for the safety of plaintiff.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell,* Judge.

Digitized by Google

AFFIRMED (*conditionally*).

*John H. Lucas* and *James E. Nugent* for appellant.

*W. B. Kelly* and *I. B. Kimbrell* for respondent.

JOHNSON, J.—This is an action by a passenger against a common carrier to recover damages for personal injuries alleged to have been caused by negligence of the carrier. A trial of the cause ended in a verdict and judgment for plaintiff in the sum of $1250, and defendant appealed.

Plaintiff, who was sixty-five years old, entered a car of defendant to become a passenger thereon while the car was standing at a regular stopping place for the reception and discharge of passengers. She alleges in her petition and her evidence tends to show that she was entering the car with reasonable dispatch and that it started forward suddenly and with a jerk while she was passing from the vestibule into the body of the car and before she had been given time to seat herself. The jerk threw her down and caused the injuries for which she asks damages. The evidence of defendant is to the effect that plaintiff's fall was caused by her own negligence and not by negligence of defendant in starting the car. It is not contended that the evidence of plaintiff was insufficient to carry the case to the jury but defendant insists there was prejudicial error in instructions numbered one, two and three, given at the request of plaintiff and that the verdict was excessive.

The petition alleges specific acts of negligence and in thus particularizing plaintiff assumed the burden of proving that her injury was caused by the negligence averred and it was necessary that her instructions on the issue of negligence should restrict her right to recover to the pleaded cause. [Orcutt v. Century Bldg.

Digitized by Google

Co., 201 Mo. 424; Hamilton v. Railway Company, 114 Mo. App. 504.]

The real ground of her complaint was not that defendant violated any duty it owed her in not holding the car stationary until she had been given a reasonable opportunity to seat herself, but that defendant, during her progress to a seat, started the car in such a violent manner as to throw her down. The law does not compel the operators of street cars to hold them at rest at stopping places until incoming passengers are seated or have reasonable opportunity to seat themselves, but it does require them if they start the cars to do so in a manner not to endanger the safety of passengers who are proceeding to seat themselves. The duty of a carrier towards its passengers calls for the exercise of the highest care in all situations and circumstances and it would not be even ordinary care to start the car so violently as to threaten the safety of a standing passenger. We find the first instruction which assumed to cover the whole case presented an hypothesis within the scope of plaintiff's pleaded and evidentiary cause. The views just expressed are a sufficient answer to the contention of defendant that the instructions should have required the jury to find "whether or not the car had remained stationary a reasonable length of time to permit plaintiff to reach a place of safety."

When defendant started the car it knew or should have known that plaintiff had not reached her seat and regardless of whether or not she had been allowed enough time to seat herself defendant had no right to jerk the car forward and throw her down.

The second instruction told the jury that the operators of the car "were in duty bound to exercise towards plaintiff the highest practical degree of care as would have been exercised by very prudent persons," etc. This instruction did not assume to cover the whole case and to direct a verdict and, therefore, does not

Digitized by Google

fall under the ban of the rule applied in the cases cited by defendant. [Detrich v. Railway, 143 Mo. App. 176; Roscoe v. Railway, 202 Mo. 576; Orcutt v. Building Co., 201 Mo. 424; McGrath v. Transit Co., 197 Mo. 97; Beave v. Transit Co., 212 Mo. 331; Conway v. Railway, 161 Mo. App. 81, 143 S. W. Rep. 516.]

The rule of those cases thus may be stated: Where the petition in a case of a passenger against a common carrier pleads specific acts of negligence it is error to direct a verdict for the plaintiff on the finding of the jury that the injury was caused by the negligent failure of the defendant to exercise the highest practicable degree of care for the safety of the plaintiff. The vice of such instruction lies in the submission of the general issue instead of the specific negligence pleaded and in so doing enlarging the scope of the petition. In the present case the instruction under consideration is free from that vice since it presents no hypothesis on which a verdict may be founded but is subject only to the criticism that it merely is declarative of an abstract rule of law. We do not think this error could have been prejudicial to defendant. As we have noted the first instruction covered the whole case and presented a true hypothesis; the jury were told what they must find in order to return a verdict for plaintiff; the second instruction did not purport to contradict or vary that direction and we fail to see how the jury could have been misled or confused by the mere statement of a true rule of law relating to the duty of a carrier to its passengers. [Bell v. Railroad, 125 Mo. App. 660; Wellman v. Railroad, 219 Mo. 126.] The following excerpt from the opinion of Woodson, J., in the case last cited is in point:

"Counsel for appellant contends that instruction numbered three given by the court on behalf of respondent is erroneous, in that it is simply a statement of an abstract proposition of law and failed to tell the jury what facts were necessary to constitute the plain-

Digitized by Google

tiff a passenger. While it is not good practice to give instructions to the jury which are legal abstractions, yet it has not been suggested in what possible manner the giving of that instruction could have worked injury to appellant, nor have we been able to conceive any such. It was the duty of the jury to read all of the instructions given together, and when so read, and especially with instructions numbered one, given for respondent, it cannot be seen in what possible manner it could have worked prejudicially to the rights of appellant. [Harrington v. City of Sedalia, 98 Mo. 583.] We, therefore, hold there was no error in giving that instruction."

The criticism of instruction numbered three is fully answered in our opinion in Wilbur v. Railroad, 110 Mo. App. 689.

We think the verdict was excessive. There were no broken bones. There was a bad sprain of the left thumb and a bruise over the left ear. Plaintiff was old and, of course, did not recover rapidly from these injuries which would have been of little consequence to a young person. There is evidence that a slight nervous shock followed the injury. Of course a person injured by the negligence of another is entitled to compensation for the actual damages sustained regardless of whether or not such injury would have been less serious to a younger person, but after giving plaintiff the benefit of every reasonable inference that may be drawn from the evidence in her favor, we think the verdict exceeded the maximum limit of her reasonable damages by $500. On condition that a remittitur of that amount be entered within ten days from the filing of this opinion the judgment will be affirmed; otherwise it will be reversed and the cause remanded. All concur.

Digitized by Google

# CORNELIUS J. SMART, Respondent, v. WABASH RAILROAD COMPANY, Appellant.

**Kansas City Court of Appeals, May 27, 1912.**

1. **NEGLIGENCE: Master and Servant: Injuries to Truckman.** Plaintiff, a truckman, sued for damages for injuries received while assisting in loading a switch frog, weighing 2000 pounds, into a freight car. The work was done under the supervision of a foreman. It is held that the evidence supported the action of the trial court in sending the case to the jury.

2. ———: ———: **Assumed Risks.** The inferiority of the servant's position compels him to rely upon the judgment of the master in respect to those dangers and risks that are not inherent to the service and which the servant, while acting within the bounds of his duty to his master, cannot avoid by the exercise of reasonable care.

3. ———: **Instruction: Measure of Damages.** An instruction on the measure of damages which allows a recovery for medical services and medicines without restriction as to amount, is erroneous where the petition fixes such expenses at a definite sum. Such damages are special, must be specially pleaded, and the recovery limited in the instructions to the amount alleged.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas,* Judge.

REVERSED AND REMANDED.

*J. L. Minnis* and *Sebree, Conrad & Wendorff* for appellant.

(1) Defendant's instruction in the nature of a demurrer at the close of all the evidence should have been given, for the following reasons: (a) The evidence shows that defendant was not negligent. (b) Plaintiff assumed the risk of injury in performing the work at the time and place in question. Cunningham v. Journal Co., 95 Mo. App. 47; Shinners v. Mullins, 136 Mo. App. 298; Chrismer v. Telephone Co., 194

Digitized by Google

Mo. 189. (2) Plaintiff's instruction 5 on the measure of damages is erroneous in that the petition alleges "that plaintiff has been at an expense for medicine and medical services in the sum of twenty-five dollars," and the instruction tells the jury that in estimating plaintiff's damages they may take into consideration "the expense for medical attendance (if any) which the evidence shows he has been obligated to pay, or for which he has become liable to pay in consequence of such injury" without limiting the amount of recovery for medical attendance to the amount of twenty-five dollars as alleged in plaintiff's petition. Blystron-Spencer v. Railroad, 152 Mo. App. 118; Radtke v. Basket & Box Co., 229 Mo. 1; Smoot v. Kansas City, 194 Mo. 513; Tinkle v. Railroad, 212 Mo. 445; Heinz v. Railroad, 143 Mo. App. 38. (3) Plaintiff's fifth instruction is erroneous in that it tells the jury that in estimating plaintiff's damages it may take into consideration "the permanent disability (if any) which the evidence shows plaintiff has sustained or will necessarily sustain in the future as a consequence of such injury, if any," while the petition does not allege that plaintiff's injuries were permanent. Blystron-Spencer v. Railroad, 152 Mo. App. 118.

*Hughes & Whitsett* for respondent.

(1) The question of negligence or no negligence on the part of defendant was for the jury and not the court, and hence the demurrer was properly overruled. (a) If it was a matter of expert testimony, then Stark's testimony made it a question for the jury. (b) If it was not a matter for expert information, then it was a question for the jury on all the facts and circumstances in proof. Fink v. K. C. Southern, 143 S. W. 568; Peek v. Stratton, 143 S. W. 501. (2) The petition does allege permanent injuries in the following words: "That his said foot is still swollen and

Digitized by Google

sore and plaintiff is informed and believes that said injury is of a permanent character and will cause plaintiff to suffer much pain and to be disabled and to lose much time hereafter." This is a direct allegation in the usual and ordinary way, supported by numerous authorities, of a permanent injury. (3) This allegation in the petition was not assailed in any manner for insufficiency or lack of specific averment, and therefore all objection to it has been waived. R. S. 1909, sec. 1804; Pomeroy v. Benton, 57 Mo. 550; Bliss on Code Pleading, secs. 436, 437, 438 and 439. (4) It was treated by the trial court, and by counsel for plaintiff and defendant, during the trial as an allegation of permanent injury, and evidence in support thereof, and in opposition thereto, was introduced by both the plaintiff and the defendant without objection. McGinnis v. Printing Co., 122 Mo. App. 228; Fisher v. Co., 159 Mo. 567; Olmstead v. Smith, 87 Mo. 607; Breidenstein v. Bertram, 198 Mo. 328; Ball v. Neosho, 109 Mo. App. 683; Meier v. Butcher, 197 Mo. 68; Britain v. Fender, 116 Mo. App. 93; Bank v. Bank, 114 Mo. App. 663; Sweinhart v. Railroad, 207 Mo. 423. (5) The words "and plaintiff is informed and believes" may be disregarded as surplusage, which leaves the direct and specific allegation that the "injury is of a permanent character and will cause the plaintiff much pain and disability and to lose much time hereafter." This objection is captious and without merit. Stone v. Railroad, 161 Mo. App. 37. (6) None of the errors assigned in appellant's brief go to the merits of this case, or were prejudicial to appellant. R. S. 1909, secs. 1831, 1865 and 1850.

JOHNSON, J.—Plaintiff, a truckman employed in defendant's freight house in Kansas City, received personal injuries while in the discharge of the duties of his employment and alleges that his injuries were caused by negligence of defendant. The answer con-

Digitized by Google

tains a general denial and plea of assumed risk and contributory negligence. The cause is here on the appeal of defendant from a judgment of $500, recovered by plaintiff in the circuit court.

The injury occurred in the afternoon of December 27, 1909, on the loading dock or platform at defendant's freight depot. The platform ran east and west on the north side of the warehouse and a house track ran along the north side of the platform. Freight cars were standing on the track and the gang of truckmen of which plaintiff was a member was employed in transferring a switch frog from a flat car to a box car. The frog was sixteen feet long and weighed 2000 pounds. The gang under the supervision of a check clerk or foreman moved the frog from the flat car to the platform, loaded it lengthwise on an ordinary two-wheeled truck and by pushing and pulling the frog moved to westward on the platform towards the box car.

The truck was only six feet long and was placed under the middle of the frog. The door of the box car was about eight feet wide, the floor of the car was approximately six inches higher than the platform and there was a distance of, perhaps, a foot between the platform and the car. A flat piece of boiler iron three feet square was used as a bridge over this space. On account of the length of the frog the only way in which it could be placed inside the car was to take it through the door in such a position that the line of the frog was on an acute angle with the door sill. It was the purpose of the foreman to wheel the load into the car over the sheet iron bridge on such angle and to do this he had the bridge placed in line with the frog and truck and directed the men to push the load ahead so that the wheels of the truck would run up the bridge into the car. In obedience to an order of the foreman plaintiff went into the car to pull on and to control the forward end of the frog and was thus engaged when he

Digitized by Google

was injured. The bridge placed in the manner described was on an acute angle with the door sill and, therefore, did not rest squarely nor firmly either on the platform or the door sill. The right hand corner of the platform end was tilted up several inches and on account of this elevation, which rendered the bridge unstable and insecure, the right wheel of the truck, instead of running on to the bridge, pushed it forward and the wheel ran off the edge of the platform causing the frog to fall on plaintiff's foot and injure it. The platform was icy and plaintiff contends its slippery condition enhanced the danger of the method of doing the work pursued by the foreman.

There are three charges of negligence in the petition, viz., first, that the two-wheeled short truck was not a reasonably safe appliance for moving a load of that kind into the car; second, placing the bridge on the angle described and not securing it by cleats or stays was not an act of reasonable care and, third, attempting to roll the load through the door over a bridge so placed was not a reasonably safe method of doing the work.

The principal contention of defendant is that the court erred in not peremptorily directing the jury to return a verdict in its favor. Counsel argue that the evidence does not accuse defendant of any negligent breach of a duty it owed plaintiff but shows that the injury was one of the natural risks of the employment —a risk assumed by plaintiff. There was no defect in any of the appliances employed in moving the frog into the car. The truck was of a type generally used in railroad freight depots and a square of sheet iron is the appliance in common use for bridging the space between platforms and cars being loaded or unloaded. And it may be conceded that the method of trucking heavy loads over such bridges without cleating or otherwise fastening the bridges has the approval of



Digitized by Google

general usage. The master does not insure his servant against dangers but against his own negligence. [Chrismer v. Telephone Co., 194 Mo. 189.] The duty of the master is to exercise ordinary care towards his servant and this duty relates to methods of work as well as to place and instrumentalities in which and with which to do the work. Where the servant while in the exercise of reasonable care and in the performance of his duty of obedience, is injured in consequence of a negligent and unusual method of work ordered by the master, the latter is liable notwithstanding he has provided a reasonably safe place and reasonably safe tools and appliances. [Kane v. Falk Co., 93 Mo. App. 209; Cunningham v. The Journal Co., 95 Mo. App. l. c. 51.]

But negligence of the master in ordering the work done in a certain manner, cannot be inferred where it appears that such method was according to general usage. "No jury can be permitted to say that the usual and ordinary way commonly adopted by those in the same business is a negligent way for which liability shall be imposed." [Coin v. Lounge Co., 222 Mo. l. c. 506, and cases cited.]

Following these rules we cannot say the evidence of plaintiff will support a reasonable inference of negligence on the part of defendant unless it discloses that the method of loading the frog directed by the foreman was unusual, less safe than the usual method, and not reasonably safe under all the circumstances of the situation.

There is evidence in the record introduced by defendant which tends to show that the foreman adopted the usual method employed in such instances but we think this evidence is fully met by other evidence that supports a reasonable inference of negligence. In our opinion the facts of this case afford a striking example of an improper and negligent use of reasonably safe appliances. To set the bridge askew so that only

Digitized by Google

one corner rested on the slippery platform and then to attempt to push the small wheel of the heavily loaded and tottering truck over the raised corner was to proceed in violation of plain physical law. It is difficult for the percipient mind to conceive of any other result following such an act than the pushing forward of the bridge and the falling of the wheel into the gap between the platform and the car. The jury were entitled to draw the inference that such a method was not one approved by common usage. The common methods of ordinarily careful and prudent men do not fly in the face of physical laws in a way to retard the work and to endanger the safety of the workmen. It is idle to say that the frog which had to be inserted into the car at an acute angle to the door could not be moved in any other manner. There was no necessity for using a truck and certainly none for running the truck over the edges of the platform, for that is what the orders of the foreman amounted to. For all practical purposes the bridge as placed was useless and might just as well have been cast aside. The foreman had rollers used in unloading the frog from the flat car and could have used rollers to run it into the box car. It appears that in his anxiety to save time he chose a method that was speedy but not reasonably safe.

These considerations suggested by the evidence of plaintiff support the action of the trial court in sending the case to the jury. The conclusion is reasonable that the injury was due to negligence of the foreman and not to an assumed risk. We do not find that plaintiff was guilty in law of contributory negligence. He was doing the work assigned him by the foreman to whom he owed the duty of obedience. To be within the confines of reasonable care he was not required by the rules of law to refuse obedience to the master unless the orders of the latter would subject him to obvious and imminent danger. The inferiority of the

Digitized by Google

servant's position compels him to rely on the judgment and care of the master in respect to those dangers and risks that are not inherent to the service and which the servant while acting within the bounds of his duty to his master cannot avoid by the exercise of reasonable care. The conduct of plaintiff in its relation to the injury was an issue of fact for the jury to determine. The demurrer to the evidence was properly overruled.

Plaintiff alleged in the petition that as a result of the injury he "has been at an expense for medicines and medical services in the sum of twenty-five dollars." His evidence tends to show that such expenses incurred by him exceed the amount alleged. The instruction on the measure of damages allowed a recovery on these items without restriction as to amount. This was reversible error. Such damages are special, must be specially pleaded and the recovery should be limited in the instructions to the sum alleged. We have no means of ascertaining the effect of the error on the jury and, therefore, cannot cure it by ordering a remittitur. [Blyston-Spencer v. Railroad, 152 Mo. App. 118; Smoot v. Kansas City, 194 Mo. 513; Tinkle v. Railroad, 212 Mo. 445.]

Further we find the instruction was erroneous in authorizing the assessment of damages on the finding that the injury is permanent. The petition does not sufficiently allege the permanency of the injury and, therefore, contains no basis for such instruction.

The judgment is reversed and the cause remanded. All concur.

Digitized by Google

H. J. WALTER, Appellant, v. GEORGE HUGGINS and the MIDLAND REALTY COMPANY, Respondents.

Kansas City Court of Appeals, May 27, 1912.

**MECHANIC'S LIENS: Breach of Contract: Measure of Damages.** Plaintiff, a subcontractor, sued to enforce a mechanic's lien for plastering. The work was not done according to the contract. The owner rented the building and did not remove the plaster or have it done as required by the contract. He was allowed damages to the extent of the reasonable cost of removing the defective work and replacing it with plaster that would conform to the contract. *Held*, that if the owner is willing to continue in the use of the defective work, that is his privilege, but he should not thereby be compelled to forego the right to reasonable compensation for the breach.

Appeal from Jackson Circuit Court.—*Hon. James E. Goodrich*, Judge.

AFFIRMED.

*McCune, Harding, Brown & Murphy* for appellant.

Where work is improperly done under a building contract and the owner, with knowledge of the defect, takes possession of and uses the building, without waiver, the amount of damages would be the difference between the value of the work as done and as it should have been done. This is the equitable rule and no other ought to prevail, because it would be unreasonable to permit the owner, after knowledge of the defective work, to use it so long as it served any good purpose and then compel the builder to pay him for entirely new work. Marsh v. Richards, 29 Mo. 105; Wright v. Sanderson, 20 Mo. App. 534; Spink v. Mueller, 77 Mo. App. 94; Surety Co. v. Woods, 103 Fed. 745.

Digitized by Google

*Cowherd, Ingraham, Durham & Morse* for respondents.

(1) Where there has been a breach of a building contract, either in materials or method of construction, the measure of damages is the sum which will reasonably have to be expended to make the work conform to the contract. Haysler v. Owen, 61 Mo. 270; Hurt v. Hahn, 61 Mo. 496; Spink v. Mueller, 77 Mo. App. 85; McCormick v. Lynch, 69 Mo. App. 524; Fairbanks v. DeLissa, 36 Mo. App. 711; Fletcher v. Mfg. Co., 35 Mo. App. 321; Wright v. Sanderson, 20 Mo. App. 534; Simons v. Wittmann, 113 Mo. App. 357; Mfg. Co. v. Phelps, 130 U. S. 537; King v. Nichols & Co., 53 Minn. 453; White v. McLaren, 151 Mass. 553; Danforth v. Freeman, 69 N. H. 466; Sutherland on Damages (3 Ed.), sec. 699. (2) The owner or employer can bring suit without completing the contract or finishing the work and can recover the expense necessary to perform the work which the contractor neglected to do. Simons v. Wittmann, 113 Mo. App. 357; Sutherland on Damages (3 Ed.), sec. 699.

JOHNSON, J.—This is an action to enforce a mechanics' lien. Plaintiff, as subcontractor, lathed and plastered a building erected on the premises of the defendant Midland Realty Company. Defendant Huggins was the original contractor. One of the defenses raised by the pleadings is that the work was not done according to the plans and specifications as required by the contract. The cause was sent to a referee who heard the evidence and reported his findings of fact and conclusions of law in which he found that the work was not done by plaintiff in compliance with the plans and specifications; that the reasonable cost of making it conform to the contract would be $800, but that since the defendant owner had deducted only $500 from the contract price as compensation for the

Digitized by Google

damages sustained in consequence of plaintiff's breach, the defendant contractor should be allowed damages only in that sum on his counterclaim. Plaintiff filed exceptions to the report of the referee which, so far as they related to the item of damages we have mentioned, were overruled and judgment was rendered for plaintiff for the value of the lathing and plastering, less the sum of $500 allowed on the counterclaim. Plaintiff appealed.

The defect in the plastering was in the workmanship. It was left uneven and "wavy" on the surface. The contract required plaintiff to do the job in a workmanlike manner and to the satisfaction of the architect. The finding of the referee and trial court is that the job was not done in such manner and it appears the architect refused to accept it. The owner purposed renting the building and it was occupied by tenants as soon as completed. It is conceded the owner sustained no loss of rentals on account of the defect and it does not appear that the plastering will be any less durable than it would have been had it been finished in a workmanlike manner, i. e., with a smooth and even surface. Over the objections of plaintiff, defendant was allowed to introduce evidence tending to show that in order to make the work conform to the contract it would be necessary to remove substantially all of the finishing coat and replace it and that the reasonable cost of such work would be about $800.

Defendant also offered to show by a competent witness "the difference in the value of that building with the plasterer's job in the condition it was left by Mr. Walter and what would be the value of it had the plastering been first-class and the best of its kind called for by the specifications." Plaintiff objected on the ground that such evidence is irrelevant and immaterial and the objection was sustained by the referee. The defendant owner occupied the building by its tenants from the date of its completion to the date of the trial,

Digitized by Google

a period of about two years, and has used the plastering in the condition left by plaintiff. The subject of controversy is the allowance of damages in the sum of $500 on the counterclaim and the difference between the parties is over the rule that should be used in measuring such damages. The rule employed by the referee and trial court and expressed in the judgment allows defendants the reasonable cost of removing the defective work and replacing it with plastering that would conform to the plans and specifications.

This is on the theory that the owner of the building has a right to require that it be built by the contractor according to the terms of the contract and that where any part of the work is in defect of the contract the owner may repudiate it and have it replaced at the cost of the delinquent contractor. The soundness of this rule cannot be questioned in instances where the owner, insisting on an adherence to the terms of the contract, acts seasonably in having the defective work removed and replaced. In such cases he is entitled to compensation for his direct and consequential damages resulting from the breach of contract. But the applicability of the rule of which we are speaking to cases such as the present where the owner, without waiving the contract or acquiescing in its deficient performance takes possession of the building and by long continued use evinces a purpose to use work defectively performed as long as it may be used, is a serious question that calls for thorough investigation and analysis.

The rule contended for by plaintiff thus is stated in the brief of his counsel: "Where work is improperly done under a building contract and the owner, with knowledge of the defect, takes possession of and uses the building without waiver, the amount of damages would be the difference between the value of the work as done and as it should have been done. This is the equitable rule and no other ought to prevail,

Digitized by Google

because it would be unreasonable to permit the owner, after knowledge of the defective work, to use it so long as it served any good purpose and then compel the builder to pay him for entirely new work."

In Marsh v. Richards, 29 Mo. 99, the contract called for pressed brick in the front of the building and the contractor used a different kind of brick. The Supreme Court held: "In such cases, although the work has not been done within the stipulated time nor in the manner or with the materials required by the terms of the contract, he who performed the work may recover what it is reasonably worth to the owner, not exceeding the contract price. When work is to be performed with a specified material, or in a particular manner, for a price agreed upon, and which is favorable to him who has the work performed, the contractor cannot, by violating his contract, place himself in a better situation than if he has complied with his undertaking. The terms on which it was proposed to do the work may have been the inducement to the contract, and to permit the contractor to violate his contract and to recover the full value of his labor and materials would be encouraging dishonesty and unfair dealing. In such cases, the measure of damages would seem to be justly arrived at by the statement, that if the work, when done under the contract and in pursuance to its terms, is worth the price agreed upon, what is the work worth, done as it is, proportionally to the price fixed by the contract? In this way, he who has contracted for the work will retain the advantage he had a right to secure to himself in fixing the price of the work, and of which the contractor cannot deprive him by his own act in violating his undertaking."

In Wright v. Sanderson, 20 Mo. App. 534, the foundation wall was not built in accordance with the terms of the contract and was made to conform to the contract by the owner. We held that "the measure of damages is the sum which it would reasonably take

Digitized by Google

to make the foundation wall such as the defendants contracted to build. And this is so whether or not the plaintiff (the owner) had expended said sum or in case he had expended said sum for said purpose, without regard to what had induced him to do so." We were guided in this expression by the opinion of the Supreme Court in Haysler v. Owens, 61 Mo. 272, to which we referred. In the Haysler case a roof defectively constructed was the subject of contention. The jury were instructed that the measure of damages was "the difference between the value of the roof agreed to be put on and the one actually put on." This instruction was approved in the opinion:

"The rule as to the measure of damages laid down by the court is a correct one as to building contracts, in all cases where the contract price is a fair valuation for the work and it has been completed in general conformity to the requirements of the contract, but has been defectively executed in some particulars, and the suit is for the contract price, and defendant does not seek to recover any special consequential damages by way of recoupment." But the court proceed to say that a different rule obtains in instances where the work has not been done in general conformity to the specifications but deviates from them either in plan or in the materials used. In such cases, and it was a case of that kind we considered in Wright v. Sanderson, supra, the rule for measuring the damages "is to ascertain what it will cost to make the building conform to what the builder contracted it should be."

"And cases might arise," say the court, "where the deviation from the terms of the contract would be so gross and reprehensible that the builder should not be permitted to recover anything for his work.

"Courts have no right to make contracts for the parties, and they cannot compel a man to pay for a building for which he did not contract, and which he does not want, and which he would rather have re-

Digitized by Google

moved from his premises, unless there has been some waiver on his part of strict performance. Builders cannot substitute their own taste or judgment or fancy for the stipulations of their contracts, and compel parties to pay for work done by them in open violation of their contracts, on the ground that it is equally as valuable as that which they have contracted to perform."

Hirt v. Hahn, 61 Mo. 496, was an action on a builder's bond in which the owner claimed damages on account of the contractor's failure to build the house according to the agreed plan. The owner expended money in completing the house and the Supreme Court, speaking through Judge WAGNER, held: "The instruction makes the element of damages depend upon the amount necessarily expended by plaintiff in completing the house, caused by Bolhofner's breach of his contract. . . . These were the legitimate sources of damages."

In Spink v. Mueller, 77 Mo. App. 85, the defendant contractors performed the work of finishing the interior wood work of the building under a contract that required them to use a certain kind of varnish. The work was completed in 1893, and was accepted by the architect and the owner occupied the house and used the work until 1896 when, on account of the defective condition of the varnishing, owing to the contractor's use of a brand of varnish different from and inferior to that specified in the contract, the owner was compelled to have all the work done over. He sued the contractors to recover his damages and in the majority opinion the St. Louis Court of Appeals said:

"Unquestionably the measure of plaintiff's damages is the sum which he necessarily expended to make the varnishing of the wood work of his house to conform to the contract, whether such sum be more or less than the sum for which the defendants contracted to do the work." Judge BIGGS challenged this rule in

Digitized by Google

a vigorous dissenting opinion from which we quote an excerpt that forcibly expresses the views on which plaintiff relies in the present case.

"I think the true measure of plaintiff's damages is the difference in value between the work as done and as it ought to have been done. It must be kept in mind that we are dealing with a building contract, and the law as applicable only to such contracts must be considered. I do not for a moment question the correctness of the rule stated in Haysler v. Owen, 61 Mo. 207, but I do say it has no application in this case. In that case Judge HOUGH said: 'When the building has been completed, but differs in plan of construction or in materials employed from that which the builder contracted to erect, and this is the only element of damage, and there has been no waiver, the true rule for estimating the damages sustained by the owner, whether the action be for the contract price or for the value of the labor and material, is to ascertain what it will cost to make the building conform to what the builder contracted it should be.' The gist of the rule as stated is, that the owner of a building has a right to stipulate for certain materials, and it is the business of the builder to comply with the stipulation. If he disregard it, the owner may, in ordinary cases, remove the work and have it done according to contract, and the builder must answer to him for its reasonable cost. But to avail himself of this remedy the owner must act seasonably, that is, when notified of the defective work, he must proceed forthwith to remedy it. When he does the expenditures therefor will be considered as direct damages resulting from the violation of the contract. In such a case the builder cannot complain that he gets nothing for the work that he did do and is made to pay the cost of the new work, for his liability is to be attributed solely to his own folly. But if the work is used with knowledge of the defect but without waiver, or if after acceptance a latent defect

Digitized by Google

is discovered and the owner continues to use the work, the damages to which he will be entitled must be regarded as consequential, that is, damages consequent upon a condition caused by the failure to perform the contract."

The Supreme Judicial Court of Massachusetts in White v. McLaren, 151 Mass. 553, has this to say of the rules pertaining to the measure of damages in such cases: "In determining such damages different elements are proper for consideration in different cases, according to the nature of the defect. Sometimes the measure of damages is the necessary cost of making the work according to the specifications. If a loss of the use of the premises for a time would naturally be involved, that should be taken into the account. We can imagine a defect of such a kind that the probability of the owners using the house without discovering it, and suffering damage to the building in such use of it, might be considered in fixing its value as constructed. The defect might be of such a character as to diminish the value of the house but little, while to make the work conform literally to the contract would involve reconstruction at unreasonable and disproportionate expense. The question ordinarily is, How much less is the building fairly worth than it would have been if the contract had been performed?"

The Supreme Court of the United States had before it a case where the plaintiff sued to recover the remainder of the purchase price of certain machinery installed in defendant's mill in a manner to make the machinery a part of the mill and, therefore, a part of the land. The defense was that the machinery which was being used by the defendant did not comply with the contract. Held, "In such a case, it would be most unreasonable to compel the defendant, in order to entitle him to avoid paying the whole contract price, or to recover damages for the plaintiff's breach of contract, to undergo the expense of taking out the ma-

Digitized by Google

chinery, and the prolonged interruption of his business during the time requisite to obtain new machinery elsewhere. The rule of damages, adopted by the court below, of deducting from the contract price the reasonable cost of altering the construction and setting of the machinery so as to make it conform to the contract, is the only one that would do full and exact justice to both parties, and is in accordance with decisions upon similar contracts." [Stillwell Mfg. Co. v. Phelps, 130 U. S. 520.]

In Davenport v. Freeman, 43 Atl. Rep. 621, the Supreme Court of New Hampshire held: "The rule of damages laid down by the referee, that the plaintiffs are entitled to the fair value of the work done by them in building the house, not exceeding the contract price, and the defendant is entitled to the fair value of the cost of correcting any bad work done by the contractor, so far as it can be corrected, and to the fair value of the damage done to him where it cannot now be reasonably replaced, as an offset in recoupment, is not strictly correct as a statement of the plaintiff's right of recovery; for it is clear that the ground upon which the plaintiff recovers, where, for failure of performance, he can not recover upon the contract, is not the value of the work done, but the benefit received by the defendant. The statement of the referee as to his application of this rule, however, makes it clear that by the fair value of the work done he means the value to the defendant. So understood the rule is correct."

In its essential facts the case in hand more nearly resembles the case of Spink v. Mueller, supra, than any other we have reviewed. The rule applied in the majority opinion was borrowed from the leading case of Haysler v. Owen, supra, and is the rule which the Supreme Court says in that decision applies to cases where the building has been completed but the work in question "differs in plan of construction or in materials employed from that which the builder contracted

Digitized by Google

to erect." Under that rule the measure of damages is the reasonable cost of bringing the work to the contract specifications. Certainly this is a just rule, since any other in logical effect would be a practical denial of the owner's right to insist on having his contract performed—on receiving what the contractor has agreed he shall have. No rule of damages should be applied where the result would be to substitute a court made contract for that the parties themselves have made. Such would be the result in the present instance should we adopt the rule contended for by plaintiff that the difference between the value of the plastering as done by plaintiff and the value of the work had it been done in accordance with contract is the true rule of damages. The defendant owner has suffered no diminution of rental value of the building and for aught disclosed the plastering will last as long as plastering put on with an even surface would last. If the owner chooses to use the work as long as it will last it will not suffer any pecuniary loss and as it does not intend to occupy the building except by tenants, the work will be just as valuable to it as work properly done. Must we say then that having a work just as valuable as that specified in the contract would have been the owner has no remedy, no right to a performance of the contract or the just equivalent of such performance? We think we are not constrained to pronounce a rule so emasculatory of one of the most fundamental principles of contract law. The substitution by the contractor of poor workmanship for good was a breach of his contract and as the poor workmanship was of a character to affect the whole job—to leave its entire surface uneven, wavy and lumpy, a standing offense to the eye and taste, the defect was as much a variance from the general plan and specifications as was the substitution of stock brick for pressed brick in the case of Marsh v. Richards, supra, where Judge Scott said that if one pays for the gratification of

Digitized by Google

his taste he has a right to have it gratified, and the delinquent contractor will not be heard to say that the house built of cheap material is as valuable as one built of more costly material. So an owner is entitled to good workmanship when he pays for it and stipulates for it. The cases we have reviewed show that in the choice of rules for the measurement of damages in building cases, the old saying that circumstances alter cases has peculiar force. But the fundamental idea running through all of the case law is that an owner is entitled to a performance of the contract by the contractor and where the contract is breached, is entitled to recover damages that will be a just equivalent for the breach. Manifestly the rule applied by the trial court is the one that fits this case. There was no acceptance of the work and the use of the building by the owner without having the work torn out and replaced did not alter its right to recover direct damages. Such use, of itself, cannot be construed as a waiver of acceptance. An owner has a right to occupy his house at any time he chooses and it takes more than mere occupation to constitute an acceptance of work not done by the contractor in accordance with the contract. To hold that the owner lost his right to damages by not replacing the work "seasonably" would be to excuse the wrong of the contractor on the ground that the owner had chosen to use its own property in a way it had a legal right to use it—a manifest absurdity.

Paraphrasing what was said by the Supreme Court of the United States in Stillwell v. Phelps, supra, it would be most unreasonable to compel the owner in order to entitle him to avoid paying the whole contract price or to recover damages for the plaintiff's breach of contract to undergo the expense of replacing the plastering and the loss of rentals while such work was being done. If the owner is willing to continue in the use of the defective work, that is its privilege,

Digitized by Google

but it should not thereby be compelled to forego its right to reasonable compensation for the breach.

The judgment is affirmed. All concur.

---

## LUTHER WARD, Appellant, v. PERRIGRINE SCOTT KELLOGG et al., Respondents.

**Kansas City Court of Appeals, May 27, 1912.**

1. **NEGLIGENCE: Defective Stairway.** The owner of premises owes no duty to protect those from injury who go upon the premises as volunteers, or merely with his express, or tacit permission, from motives of curiosity or private convenience in no way connected with business or other relations with the owner or occupier.

2. **———: ———: Pleading.** The facts set forth in the petition fail to state a cause of action, and the trial court properly sustained the demurrer thereto.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield,* Judge.

AFFIRMED.

*Alden E. Henry* and *Lawrence Fulton* for appellant.

(1) A landlord is responsible for injuries to a third person arising from the bad repair of the sidewalk space upon which the leased premises abut, if the condition existed at the time the premises were let. Stoetzele v. Swearingen, 90 Mo. App. 588; Powers v. Ins. Co., 91 Mo. App. 55; Mancuso v. Kansas City, 74 Mo. App. 138; Timlin v. Oil Co., 126 N. Y. 514. 2. There is no traveled way of a sidewalk less than its width and one traveling across a sidewalk is entitled to be safeguarded in the same degree as one traveling



Digitized by Google

lengthwise thereof. Powers v. Ins. Co., 91 Mo. App. 55; Walker v. City of Kansas, 99 Mo. 647; Goins v. City of Moberly, 127 Mo. 116.

*McCune, Brown, Harding & Murphy* for respondents.

It is unquestionably the duty of the city and of an abutting property owner, where such owner is making some use of the street in conection with his premises, to keep the sidewalk space in reasonably safe condition for passersby or travelers using the same as travelers, but such duty extends no further. Kiley v. The City of Kansas, 87 Mo. 107; Arnold v. St. Louis, 152 Mo. 178.

JOHNSON, J.—The circuit court sustained a demurrer to plaintiff's petition on the ground that it fails to state a cáuse of action and on the refusal of plaintiff to amend, rendered judgment for defendants. Plaintiff appealed and argues in her brief that her petition states a good cause. She alleges that she sustained personal injuries in consequence of defendant's failure to maintain in a reasonably safe condition a stairway leading to the basement of a building owned by defendants and occupied by their tenant who conducted a barber shop therein. The building fronts on Delaware street, one of the public streets of Kansas City, and is in the business district. The stairway from the street to the basement is in the sidewalk space. It is not alleged that the opening for the stairway was not properly guarded for the protection of pedestrians traveling on the sidewalk, but it is alleged that the steps of the stairway which were of marble were in a defective and dangerous condition to those using them for ingress and egress to and from the barber shop. A brother of plaintiff was employed in another barber shop on Delaware street and not

Digitized by Google

knowing the place of his employment, plaintiff started into the barber shop in defendants' building to inquire the whereabouts of her brother. She left the sidewalk and was going down the stairway when she tripped or stumbled on one of the defective steps and fell, receiving the injuries for which she seeks redress.

These are the material facts of the case and the question for our determination is whether or not these facts considered in the light most friendly to the cause of action asserted by plaintiff show that her injury was the result of negligence of defendants. Negligence is a breach of duty and unless it should be said that defendants owed some duty to plaintiff which they negligently failed to perform, there can be no recovery in this action, since the gravamen of plaintiff's cause is not a wanton or willful wrong but a negligent breach of duty.

We shall assume for argument that the duty of defendants, the owners of the premises with respect to the maintenance of the stairway in a reasonably safe condition for the use of persons going in and out of the basement was the same as the duty of the tenant and shall proceed to inquire into the nature of that common duty. Defendants owned the land in front of their premises to the middle of the street, subject to the public easement and, subject to reasonable municipal and public control and regulation, had the right to place the basement stairway in the sidewalk space. [Gordon v. Peltzer, 56 Mo. App. 599.]

The ordinance pleaded in the petition did not forbid such use of the sidewalk but only regulated it to the end that such openings should be guarded in a manner to protect travelers using the sidewalk against danger of injury. The ordinance was merely declaratory of the rules of common law applicable to such cases. Defendants owed the duty of reasonable care to users of the sidewalk to safeguard the opening in a way to prevent it from becoming a menace to them.

Digitized by Google

Had plaintiff's injury resulted from a breach of such duty there could be no reasonable question of her right to recover her damages in an action against the owner of the premises. [Stoetzele v. Swearingen, 90 Mo. App. 588; Powers v. Ins. Co., 91 Mo. App. 55; Mancuso v. Kansas City, 74 Mo. App. 138.] But plaintiff was not injured while using the public sidewalk. True the place of her fall was in the sidewalk space but she had left the sidewalk and was proceeding down a stairway lawfully maintained by defendants in that place as an adjunct to their building. The stairs were a private, not a public way, and were provided for the use, not of the public but of the invitees, express or implied, of defendants or their tenant. Persons using the stairway on such invitation were entitled to the protection of reasonable care on the part of defendants to maintain the steps in a reasonably safe condition for such use. Defendants owed no such duty to trespassers or bare licensees. Such users of the property of others take the property as they find it, and the owner or occupier owes them no other duty than that of abstaining from wantonly or willfully injuring them. As is said by the Supreme Court in Glaser v. Rothschild, 221 Mo. 180:

"The general rule is that the owner or occupier of premises lies under no duty to protect those from injury who go upon the premises as volunteers or merely with his express or tacit permission from motives of curiosity or private convenience in no way connected with business or other relations with the owner or occupier. [Hargreaves v. Deacon, 25 Mich. 5; Benson v. Baltimore Traction Co., 77 Md. 535; Railroad v. Slaughter, 167 Ind. 330, and cases cited; see, also, arguendo, O'Brien v. Steel Co., 100 Mo. 182, and Glaser v. Rothschild, 106 Mo. App. 418; Kelly v. Benas, 217 Mo. 1.] A bare licensee (barring wantonness or some form of intentional wrong or active negligence by the

Digitized by Google

owner or occupier) takes the premises as he finds them."

Plaintiff was not using the stairway on implied invitation. She was not going into the barber shop on any business except her own private business in which neither defendants nor their tenant had even the most remote interest. She was a mere licensee and defendants did not owe her the duty of reasonable care. The learned trial judge in sustaining the demurrer to the petition took a correct view of the law of the case.

The judgment is affirmed. All concur.

---

## EMMA LEMMONS, Respondent, v. WILLIAM ROBERTSON, Appellant.

**Kansas City Court of Appeals, May 27, 1912.**

1. **ASSAULT: Intent: Pleading: Question for Jury.** In an action for damages for assault, proof that defendant broke into plaintiff's house in the nighttime and placed his hands on her person while she was asleep, is sufficient to authorize a recovery, and it was not necessary to prove the assault was committed with intent to have carnal intercourse, although the petition so alleged.

2. **———: Remarks of Counsel: Bill of Exception.** Objections to remarks of counsel in the argument to the jury cannot be made a part of the record by affidavits of persons, who heard the argument, in support of a motion for a new trial. The bill of exceptions must recite what occurred as the trial progressed.

Appeal from Worth Circuit Court.—*Hon. William C. Ellison,* Judge.

**AFFIRMED.**

*O. B. Hudson* and *Kelso & Kelso* for appellant.

*L. M. Phipps* and *John Ewing* for respondent.

Digitized by Google

BROADDUS, P. J.—This is an action for assault. The complaint is to the effect that the defendant broke into the plaintiff's house at night and assaulted her for the purpose of illicit intercourse. The plaintiff is a widow living on a farm in Worth county in the vicinity of the town of Denver. The assault is alleged to have been made in April, 1910. Her family, besides herself, consisted of her father-in-law and five children.

Plaintiff testified that about eight o'clock on the night in question the defendant came to her house and remained talking with the family until the children got sleepy and wanted to go to bed, when she told defendant it was getting late and that she also wanted to go to bed, when he said he would go home; that "He wanted to know if I wouldn't marry him. Then he wanted to know if I wouldn't accommodate him that night. I told him I didn't have to disgrace myself and family that way. He then said he would go home —started home. I fastened the door and went to bed. One of my children was sick. I turned the light down, went off to sleep, was awakened up in the night seeing something was wrong—some bad odor of some kind under my nose. I waked up then in a fright and smelled it, and says, 'O my God! who is this!' He says, 'It's me,' in a low voice; and I asked him what he was doing there and how he got in. He says, 'I got in;' and I says, 'You get out of here.' By that time my boy began to raise up and he went out." She stated that he had one hand on her shoulder and something under her nose of bad odor of some kind—she thought chloroform. The time was about two o'clock; and that the assault made her very weak, sick and nervous, which bothered her all summer. She stated that she saw defendant next day at Denver in Charley Wilson's store, when he came up to her and offered her three dollars in money if she would keep her mouth

Digitized by Google

shut; that she told him she didn't want his money, and that this trouble was not settled yet.

The son Lester, who was sleeping in the same room with plaintiff, testified, that he had gone to sleep before defendant had left the house, but was awakened in the night by the scream of his mother; that he got up and fastened the door when the defendant left. It was shown by plaintiff's evidence that the door had been fastened by a button and there was evidence explaining how defendant could have gotton into the house by reaching in with a stick through a broken pane in a near-by window. The son corroborates his mother as to what occurred at Wilson's store, and as to the effect the assault had upon her health. Plaintiff proved a good reputation for chastity.

The plaintiff testified that on the day after the assault she consulted with Wm. Miller, a lawyer, in reference to the matter, but did not mention the name of her assailant. Mr. Miller appeared as one of defendant's counsel at the trial.

Defendant in his statements admitted that he was paying his addresses to plaintiff, but denies that he made the alleged assault, or that he offered plaintiff money to remain silent. Other evidence on behalf of defendant tended to show that plaintiff was friendly with him at Wilson's store the next day, and that she and her son stayed all night at defendant's house after the alleged assault. The plaintiff and son both testified that it was before the alleged assault that they stayed at defendant's house all night. The burden of defendant's evidence was to discredit plaintiff in every important particular.

The jury returned a verdict for $400 actual and $500 punitive damages. From the judgment defendant appealed.

The contention of appellant is that the court erred in not directing a finding in his behalf; that the court committed error in giving and refusing instructions;

Digitized by Google

and in refusing to reprimand Mr. Ewing, plaintiff's attorney, for certain allusions he made in closing the argument as to the conduct of Wm. Miller, one of defendant's counsel. The appellant treats the action of the court in failing to direct a verdict for defendant as of the most importance. It is not contended that there was no evidence sustaining plaintiff's case, but that it was improbable and shown to be wholly unworthy of credit. The same argument, we presume, was presented to the trial court on the hearing of the motion for a new trial.

This cause was tried before a judge whose experience and ability rendered him highly competent to pass upon the credibility of witnesses. He saw them while on the stand and noted their behavior and their manner of testifying. If their evidence was as the appellant asserts it to have been we feel certain the court would have set aside the verdict and granted a new trial. But as the court refused the motion, we are satisfied that the judge was of the opinion that the matter was one for the jury. In this opinion we coincide. If plaintiff and her son told the truth she was entitled to a verdict. The jury held that they did. There was only one authority under the law to decide the question and that was the jury, subject to revision by the judge.

We do not find any fault with the instructions given for plaintiff, and those offered by defendant and rejected by the court were properly rejected, especially instruction 3, which reads as follows: "The court instructs the jury that the burden is on the plaintiff to show by a preponderance of the evidence that the defendant did at or about the time alleged in her petition, assault her with the intent to have carnal intercourse with her, and without her consent; and unless they believe from a preponderance of all the facts and circumstances in evidence in this case, that the defendant did assault the plaintiff with the intent

Digitized by Google

to have carnal intercourse with her by unlawfully placing his hands upon her while she was in her bed, at her home, in the nighttime, then their verdict should be for the defendant. By the preponderance of the evidence is meant by the greater weight of the testimony in the case, and unless she has so satisfied the jury then they must find for the defendant." The fault of the instruction is that it requires the jury to find that the assault was made upon the part of defendant with the intent to have sexual intercourse with plaintiff. The gravamen of the charge is the assault, and it was not necessary for plaintiff to prove the intent with which the assault was made in order to recover, although intent was alleged in the petition. The intent could only go to the question of damages. Proof that defendant broke into her house in the night time and placed his hands on plaintiff's person while she was asleep was sufficient to authorize a recovery under the petition. The plaintiff, having proved enough as a basis to recover, was not required to prove more, although more was alleged.

Instruction 4 refused by the court was properly refused as its purpose was to exclude certain evidence testified to by plaintiff and her son.

It is urged that the verdict was to a great extent the result of prejudice caused by the remarks of Mr. Ewing, plaintiff's counsel, while closing the argument. It seems that the plaintiff's counsel commented on the fact that Mr. Wm. Miller, the lawyer with whom plaintiff consulted, as stated, after the alleged assault was representing defendant, and by his remarks, it is asserted, in some way prejudiced the minds of the jury against defendant. It is not necessary to go into detail as to what was said by Mr. Ewing. The matter is attempted to be made a part of the record by the affidavits of persons as to what Mr. Ewing said in his argument; what defendant's counsel said and what the court said. That was not the way to get the matter

Digitized by Google

into the record. The bill of exceptions must recite what occurred during the trial as the trial progressed. Such matters cannot be made a part of the record by affidavits in support of a motion for a new trial. Finding no error of record the cause is affirmed. All concur.

---

## CITY OF FULTON, Respondent, v. ROBERT CRAIGHEAD, Appellant.

**Kansas City Court of Appeals, May 27, 1912.**

1. **MUNICIPAL CORPORATIONS: Plumbers: License: Right to Tax: Ordinance.** A city charter did not name plumbing as a business or vocation which might be taxed, and it was held that an ordinance requiring plumbers to pay a license of $25 for the revenue fund, was invalid.

2. **———: ———: ———: ———: ———: Business: Shop.** An ordinance which requires a license tax for plumbers in doing any work connected with sewers and house connections therewith, is essentially a tax on his business if conducted outside of his shop.

Appeal from Callaway Circuit Court.—*Hon. D. H. Harris,* Judge.

REVERSED.

*E. L. McCall* for appellant.

*N. T. Crane* for respondent.

ELLISON, J.—Defendant was convicted of violating a certain ordinance of the city of Fulton, a city of the third class, in doing certain work without being licensed as a plumber. That ordinance provided that "No person, firm or corporation shall lay, alter or repair any house drain, sewer, or plumbing work, or

Digitized by Google

make any connections whatever with any sewer, . . . or do any kind of work connected with laying house drains, or sewers, or plumbing . . . etc., unless regularly licensed by the city council." Section 4 of the ordinance requires any one "desiring to do business as a plumber, in connection with the sanitary sewer system," shall file application for license, etc., and that he shall give a certain bond, etc. It then provides for a "license fee of twenty-five dollars to go to the general revenue fund." Section 5 provides, in addition, for a permit to connect with any sewer; and section 8 provides for a permit fee of two dollars and fifty cents.

The ordinance requires a license of twenty-five dollars, to go into the general revenue fund of the city, for the privilege of carrying on the general business of plumbing. The statute (Sec. 9580, R. S. 1909) provides that no municipal corporation shall have the power to impose a license tax on any business, calling, vocation or pursuit, unless "it is specially named as taxable in the charter," or unless "such power be conferred by statute."

The statute (section 9253) enumerating the kinds of business, or the callings, vocations or pursuits, which may be taxed, does not name plumbing as one of them. Nor is there anything in any other statute from which the power is either fairly or necessarily implied. [City of Independence v. Cleveland, 167 Mo. 384.] Therefore the city of Fulton must look to the Legislature, instead of the courts, for the requisite power.

It is said that this ordinance only contemplates a fee to be paid by a plumber for the privilege of connecting with sewers. It does not read so narrowly as that. It provides for the business of house plumbing and drains. In fact, it embraces about all of a plumber's business, except that which he might carry on inside his shop as a merchant or manufacturer. Besides, as shown above, a connecting fee of two dol-

Digitized by Google

lars and fifty cents is provided for in another part of the ordinance.

As the defendant should not have been convicted, the judgment will be reversed. All concur.

---

## CITY OF COLUMBIA, Respondent, v. JOHN SAMUELS, Appellant.

Kansas City Court of Appeals, May 27, 1912.

**CRIMINAL LAW: City Prosecution: Arraignment: Civil Action.** In a prosecution for violating a city ordinance, in the sale of liquor, a conviction will not be invalidated because the defendant was not arraigned and a plea of not guilty entered. In that respect the prosecution bears resemblance to a civil action.

Appeal from Boone Circuit Court.—*Hon. D. H. Harris,* Judge.

AFFIRMED.

*W. H. Rothwell* and *J. L. Stephens* for appellant.

*W. M. Dinwiddie* for respondent.

ELLISON, J.—Defendant was convicted in the police court of Columbia for the violation of a city ordinance, in the sale of intoxicating liquor. He appealed to the circuit court and was again convicted.

It is objected that the record fails to show an arraignment of defendant and his plea to the charge. In this respect, cases of this nature are likened to procedure in civil cases and an arraignment is not necessary. [St. Louis v. Knox, 74 Mo. 79.]

Defendant likewise insists that his motion in arrest of judgment should have been sustained on ac-

Digitized by Google

count of insufficiency of the information filed in the police court. In our opinion it is sufficient to sustain the finding and judgment.

It is next insisted that if the trial court had given defendant the benefit of the reasonable doubt which it is claimed the evidence shows, it would have resulted in his acquittal. But after consideration of the arguments made by counsel, and the record in the cause, we are satisfied we have no right to interfere on the score of insufficiency of evidence.

An examination of the record leads to an affirmance of the judgment. All concur.

---

## CENTRAL PENNSYLVANIA CONFERENCE EDUCATIONAL SOCIETY OF THE METHODIST EPISCOPAL CHURCH, Appellant, v. HARPER M. LARUE, Respondent.

**Kansas City Court of Appeals, May 27, 1912.**

1. **JUDGMENTS BY CONFESSION: Foreign State: Debt: Evidence: Prothonotary.** A prothonotary in the state of Pennsylvania has no authority to confess judgment for a debtor in a written instrument unless the debt can be ascertained from the face of the paper itself. And if it requires evidence to ascertain what the sum claimed to be due is, the prothonotary cannot enter a confession of judgment under the law of that state.

2. **———: ———: Written Paper: Conditions: Contingencies.** Where a note was given payable only on several conditions and contingencies therein set out, and there is nothing to show that these have transpired, the prothonotary in Pennsylvania has no authority to enter a confession of judgment thereon.

3. **———: ———: ———: ———: Personal Service: Authority of Prothonotary.** Where a confession of judgment has been entered by the prothonotary and there has been no personal service, the authority of the person confessing the judgment may be questioned in an action on the judgment in another state.

Digitized by Google

4. ———: ———: ———: ———: **Judicial Powers: Face of Paper: Action.** In confessing and entering judgment in the state of Pennsylvania, the prothonotary only acts as clerk of the court; he has no judicial powers and cannot hear evidence of the debt, but must look to the terms of the instrument authorizing the confession, and if it does not disclose a proper state of facts, no confession can be made which will bind the defendant in an action on the judgment in this state.

5. ———: ———: ———: **Judicial Proceedings: Clerk: Judicial Power.** Though a foreign judgment should be considered as valid in the state where rendered, yet if it is not the result of judicial proceedings, but is entered by the clerk as by the confession of the debtor, it is not conclusive against the debtor where asserted by an action thereon in another state. The debtor cannot confer judicial power upon the clerk of a court so as to enable him to perform the functions of the court.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas,* Judge.

AFFIRMED.

*New & Krauthoff, John N. Davis* and *John Taylor* for appellant.

*George Kingsley* for respondent.

ELLISON, J.—This action is on a judgment rendered against defendant in the state of Pennsylvania. The defendant prevailed in the trial court.

The judgment purports to be by confession of defendant, entered in the Pennsylvania court by the prothonotary of that court; it being contended by plaintiff that the instruments upon which the judgment was taken not only authorized the confession, but authorized the prothonotary to make or enter such confession. One of the obligatory instruments upon which the judgment was rendered (the others beink like it) is as follows:

Digitized by Google

"WILLIAMSPORT, PA., April 15, 1896.

"On demand, I promise to pay, for value received, to the treasurer of the Central Pennsylvania Conference Educational Society of the Methodist Episcopal Church, the sum of seventy-five...../100 dollars, subject to the following conditions, to-wit:

"I have given the above note for money borrowed as a means of securing an education preparatory to becoming a minister or missionary of the Methodist Episcopal Church, on the following conditions, viz.:

"1. That payment will not be demanded while I consistently pursue my studies and make other appropriate efforts to attain the object above stated.

"2. That upon leaving school settlement be made with the treasurer by giving a note covering all my indebtedness, which note shall bear interest at five per cent after two years, said interest to be paid on January 1 and July 1 of each year.

"3. That in case of any change of purpose, or of my failure to enter the ministry of the Central Pennsylvania Conference of the Methodist Episcopal Church (unless it be through loss of health) I shall hold myself to be both morally and legally held to make payments of said note in full, with interest at six per cent from the date of the note.

"4. That, except in the case of foreign mission service, I shall hold myself both morally and legally bound to refund to the board after two years from the time I cease to attend school or sooner if practicable, the full amount of principal, together with the interest accruing after said two years, and if I fail to keep or perform any or all of the above stated conditions, I hereby confess judgment for the above sum, hereby waiving the benefit of any and all exemption laws, release of all errors and stay of execution."

It will be observed that the latter part of the promissory instrument executed by defendant authorized a confession of judgment—it was, in fact, a confession

Digitized by Google

of judgment, so far as it could be made by the paper itself. It does not appear whether defendant resided in and was a citizen of the state of Pennsylvania when he executed the instrument in 1896, though it does appear that he has been a resident of this state since April, 1899. We therefore cannot say whether his citizenship would have controlling effect, if it were necessary to pass upon this branch of the case, as intimated in Grover & Baker S. M. Co. v. Radcliffe, 137 U. S. 287, 298.

But there is another branch of the case which we believe should control an affirmance of the view taken by the circuit court. While a prothonotary in a foreign state, may enter a judgment as by confession, when duly authorized in the writing evidencing the defendant's debt, and such judgment will be given full faith and credit in a suit upon it in this state (Randolph v. Keiler, 21 Mo. 557; Crim v. Crim, 162 Mo. 544), yet, if the duty of the prothonotary cannot be ascertained from the provisions of the obligatory paper, and the precise sum for which judgment should be rendered cannot be ascertained from the paper, and an inquiry *aliunde* the paper is required, it must pass under judicial scrutiny and direction and cannot be acted upon by the prothonotary. Thus, in Connay v. Halstead, 73 Pa. St. 354, there was a written contract for the sale of land at ten dollars per acre, the quantity to be determined by a survey, and it was held that a prothonotary's authority given in the contract to confess judgment for the sum found to be due, could not be exercised. It is said in that case that the party himself must have acknowledged the sum due.

The same rule has been stated in Richards v Richards, 135 Pa. St. 239, and Whitney v. Hopkins, 135 Pa. St. 246, wherein that case was referred to with approval. In those cases the right of the prothonotary to confess the judgment was upheld under the

Digitized by Google

facts disclosed in each, but on the specific ground that the prothonotary could ascertain from the instrument the sum for which judgment was to be entered. The power to confess the judgment must be strictly pursued and no judicial functions should be left with the prothonotary. In Campbell v. Goddard, 117 Ill. 251, the instrument confessed judgment for a given sum "and a reasonable attorney's fee," and it was held that the clerk could not hear evidence and determine what a reasonable attorney's fee was, and that: "In fixing the amount of the judgment he can only look at the *cognovit,* and enter judgment for the amount there confessed." In Grover & Baker S. M. Co. v. Radcliffe, supra, the Supreme Court of the United States held that a power to confess judgment, given to "any attorney of any court of record," was not authority to a prothonotary in Pennsylvania to enter such confession, which would be recognized outside of Pennsylvania, although authorized by the laws of that state.

It will be observed that the obligatory writing in this instance does not authorize some one other than the prothonotary to confess judgment; nor does it, in terms, authorize that officer to do so. So we have not a case, like some of those cited, where some one other than the person authorized, has confessed the judgment, and we assume that the confession, being entered by the prothonotary, sufficiently complies with the laws of Pennsylvania to make the judgment valid, so far as the person entering it is concerned.

But the instrument in this case upon which the confession of judgment is entered, upon its face discloses that judicial inquiry must be had to ascertain whether anything is due. The provisions of the contract are awkwardly stated and are not easily understood. It is clear that the obligation is a conditional one. The contract starts out with a promise to pay



Digitized by Google

seventy-five dollars on demand (no interest mentioned) "subject to the following conditions:" First, that payment is not to be due while defendant is pursuing his studies for the ministry. Second, it is not to be due if upon leaving school he shall make a settlement with the treasurer for all of his indebtedness and give a note for the amount with five per cent interest after two years. Third, if he makes the settlement with the treasurer, he is to pay the note given in such settlement in two years, or "sooner if practicable," unless he engages in the foreign mission service, in which case we infer he is not to pay anything. But if he fails to perform these things, then he says, that "I hereby confess judgment for the above sum;" which, we suppose, means the original sum of seventy-five dollars. It will be noticed in the copy of this paper above set out there is a third "condition," which consists principally of restating his obligation to pay "said note in full with interest at six per cent from date." Though there are two notes already mentioned, we assume the first one is meant. But a few words are inserted in parenthesis which seem to indicate that if he loses his health the note is never to be paid.

The obligation to pay the seventy-five dollars borrowed by defendant in the first instance, does not arise even though he fails to pursue his studies for the ministry, or as a missionary, if such failure is occasioned by his loss of health. Nor does it arise if he attends the school, but makes settlement of his indebtedness and gives a note therefor, which we assume would stand in place of the original note. Nor would this second note become payable in case he went into the "foreign mission service." We are, however, not concerned with that note, save in an incidental way.

From the foregoing considerations it seems manifest that the prothonotary could not ascertain from the face of this paper what sum, if anything, was due

Digitized by Google

from defendant. The cases of Richards v. Richards, supra, and Whitney v. Hopkins, supra, though cited by plaintiff, are authority for defendant. For it is there asserted, as we have already intimated, that the prothonotary is but the clerk of the court, and "If the amount due cannot be ascertained from the face of the instrument, the prothonotary cannot enter judgment upon it, for . . . he has no power to act beyond." In the first of those cases there was an agreement between husband and wife, as follows: "I, Charles F. Richards, of Brooklyn, Susquehanna county, Penna: Hereby agree that from date hereof I will well use and kindly treat my Wife Mary R. Richards as becometh a Husband, that I will permit her to Visit her Parents and friends as often as she May reasonably desire, also permit her Parents, Brothers and Sisters to visit her at her House, She Shall have consent to attend Public Worship Whenever She may So desire: I hereby acknowledge that I have received from My Said Wife Mary R. Richards the sum of three Hundred and Sixty Dollars which I have used in payment of My Property for which I hereby confess Judgment with Interest and Cost and release of all errors Should I violate the above agreement, and Give the annexed Bond for the faithful performance of my part of the foregoing."

There was a bond given in double the amount of the money due the wife, for the faithful performance of the agreement. Justice Williams refers to the difficulty in understanding the agreement, but construes it to mean a direct promise to repay to the wife the money obtained from her and disposes of the bond by holding it as security for the kind treatment promised. The paper, thus construed into a separate direct and unconditional promise to pay the wife three hundred and sixty dollars, showed on its face a certain sum due the plaintiff. In the second case, the agreement was that judgment on confession should be entered if

Digitized by Google

there was default for three months in the payment of installments, and it was held that it could be ascertained from the instrument itself the amount due from the credits of payments endorsed on the paper, as well as the matter of three months' default from the last payment.

But it may be claimed that, right or wrong, a judgment has been entered in a court of competent jurisdiction in the state of Pennsylvania, recognized as valid by the courts of that state, and that it concludes defendant when asserted in the courts of another state. That is not the rule where there has been no service of process and no entry of appearance. And if there be an entry of appearance, or confession of judgment, by a person who had no authority, that fact may be shown in an action on the judgment brought in a foreign state, and we have shown that the writing in controversy was not of that character in which the law of Pennsylvania authorized the prothonotary to act.

It is not a correct statement of the law, that a true test of the conclusiveness of a judgment in a foreign state is its recognized validity by the laws of that state. [Sallee v. Hays, 3 Mo. 116; Sevier v. Roddie, 51 Mo. 580; Grover & Baker S. M. Co. v. Radcliffe, supra.] These cases are recognized as binding authority by Judge MARSHALL in Crim v. Crim, supra. A foreign judgment, to be conclusive in the jurisdiction of another state, must be a judgment founded upon judicial proceedings, which were absent in the case at bar. The sum due, if anything, was not ascertained by the paper defendant executed, and judicial power of inquiry into that question could not be delegated by him to the clerk of the Pennsylvania court. And we have seen that is the view taken by the Supreme Court of that state; but if it were not, if that state recognized the validity of such a judgment, the courts of this state would not, when such judgment came to be asserted here. If we should allow what was done

Digitized by Google

with this paper to have the force and effect of a judgment in Pennsylvania, it would be merely by force of the statute in that state, and not that it was the result of a judicial proceeding. [Foote v. Newell, 29 Mo. 400, 405.] In that case, Judge SCOTT said:

"If a state, in carrying out a policy of her own, disapproved or discountenanced in other states, finds it convenient to give to proceedings having no affinity to judicial ones the force and effect of judgments, the other states are not required by the Constitution to give to those acts the force and effect they may have in the state by which they were authorized."

We think the judgment should be affirmed. All concur.

---

## GUY FULTS, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

**Kansas City Court of Appeals, May 27, 1912.**

1. **STREET RAILWAYS: Invitation to Ride: Evidence.** Plaintiff, a boy fourteen years old, frequently boarded a street car at the front end and where the vestibule entrance faced towards the other track. To do this he stood between the tracks and signalled for the car to stop. As it slowed down to near a stop, the motorman said to him: "Get on, kid," and as he got one foot on the car step, the car was suddenly started forward with a jerk, throwing him to the pavement, the car wheel running over his leg so that it had to be amputated. It was held to be a case for the jury.

2. **———: Instructions: Care and Prudence: "Permit."** Where other instructions clearly define the care and caution necessary in a plaintiff in deciding whether to attempt to board a slowly moving car, it is not reversible error to give an instruction submitting whether the situation was such as to "permit" a cautious person to board the car.

Appeal from Jackson Circuit Court.—*Hon. James H. Slover*, Judge.

AFFIRMED.

Digitized by Google

*John H. Lucas* and *Bruce Barnett* for appellant.

*Brewster, Kelly, Brewster & Bucholz, E. H. Busiek* and *Paul R. Stinson* for respondent.

ELLISON, J.—Plaintiff's action is for injuries received by him in attempting to board one of defendant's street cars, in Kansas City, Kansas. He recovered judgment in the trial court.

It appears that defendant's car had a vestibule entrance at each end, so that in going either way on its double tracks, the outside entrance would be at the rear and the front entrance would open next to the other track. Plaintiff, a lad about fourteen years old, with his mother and two or three others, were at the corner of a street to take passage. As a car was approaching, plaintiff crossed over one track, walked between the tracks about a carlength, so that when the car should stop for the others to get on at the rear, it would throw the front entrance near him at his place between the tracks. He signalled the motorman, whom he knew, to stop, and in response thereto the car began to slow down, and as it got to him it was going very slow—about as fast as a walk—and the motorman said to him: "Get on, kid." He attempted to do so and had gotten a handhold on the railing, one foot on the step and the other off the ground, when the car was suddenly started forward with a jerk, which threw him onto the street, one leg getting under the car wheel, crushing it so that it was afterwards amputated just below the knee.

Defendant's first objection is not supported by the evidence as the testimony in plaintiff's behalf tends to show the facts to be. It claims that the undisputed evidence shows the car did not stop "at the corner where plaintiff attempted to board it;" and that, therefore, there was no invitation to plaintiff. But it appeared that plaintiff had frequently got on in the same

Digitized by Google

way with the consent of the persons in charge of the car, and that in this instance the motorman asked him to get on.

The second point relates to the admission of evidence that a negro boy got on the car at the other end after it had slowed down. We do not see any objection to the evidence. The negro boy was with those who were intending to get on at the rear vestibule. The witness stated that as the car was coming to a stop, a negro boy and two other parties were in front of her and that the negro boy got on, but before the others could get on, the car started up with a jerk. The tendency of this was to show the truth of plaintiff's theory of the case.

The only question presenting any substantial objection to the judgment, relates to two of plaintiff's instructions. They submit to the jury whether the car was moving at such slow rate of speed that a person of ordinary prudence and caution would have attempted to get on. In doing this, the instructions read that if it be found from the evidence that the car was moving so slowly as to "permit" a person of ordinary prudence, etc., to get on. The idea advanced in criticism is that a condition might be such as that it would permit a person of prudence to do it, and yet not be such a condition as that a prudent person *would* do it. We think it unfortunate that departures from the well-known and continuously used paths of direction to juries on this head, should be made. At the same time we cannot say, in view of *all the instructions* as to the care required of plaintiff, that the jury was misled, and we therefore feel disinclined to disturb the judgment. We find that the same word was used in an instruction approved in Spencer v. Transit Co., 111 Mo. App. 653, 663, though that part of it is not discussed.

We think the court properly refused defendant's instruction 4. The petition states facts making the

Digitized by Google

inference plain that the motorman saw plaintiff in getting on the car. The criticism of the court's action is not well made.

On the whole record we see no cause justifying our interference, and the judgment is therefore affirmed. All concur.

---

## CLARK WILLIAMS REALTY COMPANY, Appellant, v. H. H. BRIGGS et al., Respondents.

**Kansas City Court of Appeals, May 27, 1912.**

1. **MECHANICS' LIENS: Contractor: Owner: Personal Judgment** In a suit against the contractor and landowner on a mechanic's lien claim, there may be a personal judgment rendered against the contractor notwithstanding no lien is established.

2. **———: ———: Jurisdiction of Justice: Different Amounts: Judgment.** Where the jurisdiction of a justice of the peace is limited to a sum not exceeding $250, in an action for the enforcement of a mechanic's lien, and to a sum not exceeding $300 in personal actions, and an action was brought against the contractor and landowner for a personal judgment against the former for $265 and to enforce a lien for that sum: It was *held*, that though there was no jurisdiction over the lien, yet as the sum claimed was less than $300, a personal judgment could rightfully be rendered against the contractor.

3. **———: ———: ———: ———: Judgment: Appeal: Void Lien: Dismissal.** In an action brought before a justice of the peace against a contractor and a landowner, for a personal judgment against the former and for enforcement of a mechanic's lien against the property of the latter, the sum sought was greater than the justice's jurisdiction for the enforcement of a lien, but within his jurisdiction for a personal judgment. The justice rendered a personal judgment against the contractor and also for an enforcement of the lien. The contractor appealed to the circuit court, but the landowner did not. *Held*, that that part of the judgment before the justice enforcing the lien, was void; but that a personal judgment could be rendered against the contractor by the circuit court, and that it was error to sustain the contractor's motion to dismiss the case.

Digitized by Google

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn,* Judge.

REVERSED AND REMANDED.

*McCune, Harding, Brown & Murphy* for appellant.

(1) The justice of the peace had jurisdiction to render a personal money judgment against respondent for an amount aggregating $300, even though he did not have jurisdiction to enforce the lien. Patrick v. Abeles, 27 Mo. 184; Mulloy v. Lawrence, 31 Mo. 583; Matlock v. Lare, 32 Mo. 262; Williams v. Porter, 51 Mo. 441; Wright v. Beardsley, 69 Mo. 548; Company v. McCornish, 74 Mo. App. 609; Heimberger v. Harrison, 83 Mo. App. 544. (2) An appealing party cannot take advantage of an error which injured only a non-appealing coparty. Christopher v. Kelley, 91 Mo. App. 93. (3) Respondents' motion to dismiss the cause having been overruled in the assignment division of the circuit court, the matter was *res adjudicata* in that court. Mangold v. Bacon, 237 Mo. 496, 141 S. W. 650; Johnson v. Latta, 84 Mo. 142; Chouteau v. Gibson, 76 Mo. 51.

*L. N. Dempsey* for respondents.

The justice of the peace had no jurisdiction of the subject-matter of said suit and the judgment rendered was void, it being in excess of the jurisdiction of the justice in a suit to enforce a mechanics' lien, $250 being the maximum limit of a justice of the peace jurisdiction in such case. Mill Co. v. Short, 58 Mo. App. 320.

ELLISON, J.—This action was begun before a justice of the peace of Jackson county, against the contractor and the owner of a one-story brick building,

Digitized by Google

to recover a judgment for $265, and to enforce a mechanic's lien against the building for that amount. Judgment was rendered against the contractor for the amount claimed and also enforcing the lien against the owner's property. The contractor, alone, appealed to the circuit court. In the latter court the contractor filed his motion to dismiss the cause of action on the ground that the justice had no jurisdiction. This motion was sustained and thereupon plaintiff appealed to this court.

The ground stated for lack of jurisdiction is that in counties of more than fifty thousand population, Jackson county being one of such counties, a justice has jurisdiction of mechanics' liens only where the sum does not exceed $250. It is conceded that in ordinary actions in such counties the justice has jurisdiction of sums not in excess of $300; but the claim is, that since this was an action instituted to enforce a lien for more than the amount limited in the enforcement of liens, no personal judgment could be rendered against the contractor.

We think there is no doubt that a plaintiff might bring an action to enforce a mechanic's lien, making both the contractor and owner of the property parties, and failing in his lien, yet obtain a valid personal judgment against the contractor. [Patrick v. Abeles, 27 Mo. 184; Mulloy v. Lawrence, 31 Mo. 583; Matlack v. Lare, 32 Mo. 262, 264; Wright v. Beardsley, 69 Mo. 548, 550; Cahill, Swift & Co. v. McCornish, 74 Mo. App. 609; Heimberger v. Harrison, 83 Mo. App. 544.] A personal judgment is the principal thing and a lien the incident. For a lien cannot exist without the judgment, but the judgment does not depend upon the lien.

But in this case the plaintiff did not fail with his lien. He obtained judgment in the justice's court establishing it. That judgment, however, was void on its face, being for a greater amount than the jurisdiction of the justice, and the owner, it seems, gave it

Digitized by Google

no attention and did not appeal from it. Being void, we see no reason why it may not be treated as though plaintiff had failed to establish his lien, or had never asked for its enforcement, and a personal judgment taken against the contractor. The fact that the action was brought to enforce a lien against the owner's property, ought not to put out of mind that it was also brought for a personal judgment against the contractor, and a personal judgment might be had against the contractor for any sum within the jurisdiction of the justice in ordinary actions. The lien, as we have said, is really only an incident following the personal judgment.

The rule as to entirety of judgments and that no one can be heard on an appeal to the circuit court except those who joined in it, does not apply to a case where a contractor appeals and the property owner does not. In such case, errors against the landowner and his right to complain, do not concern the contractor. The reverse of this would be true, however, where the landowner appeals and the contractor does not, for the former is interested in the amount adjudged against the contractor, since it is fixed as a lien on his property. [Christopher v. Kelly, 91 Mo. App. 93, 99.] In that case we think Judge Goode properly explains and makes the distinction between the cases therein referred to—among others, that of Carthage M. & W. L. Co. v. Bauman, 55 Mo. App. 204—a case relied upon by defendant.

We are likewise referred to Little Rock Trust Co. v. S. M. & A. Ry. Co., 105 Mo. 669, 685, 687, a railroad lien case. It has no application to this. There the contractor was not brought into court, and though made a party, the case as to him was dismissed and the action was exclusively *in rem*. A judgment had been rendered against the property of a defendant railroad which had not been served with process (another road was served) and it, with the other road,

Digitized by Google

came into court to have the judgment set aside. This was refused and the railway company which had not been served appealed to the Supreme Court. We have only attempted to state the case in a short way, but sufficiently to show that the court remarking, on page 687 of the report, that the judgment was an entirety, has no application to the case before us.

The case then is this: Plaintiff brought an action for personal judgment against a contractor and to enforce a mechanic's lien therefor against the owner's property, for a sum in excess of the jurisdiction of a justice of the peace for the enforcement of mechanics' liens, but within the limit of such jurisdiction for personal judgments. A personal judgment was rendered against the contractor and charged as a lien against the property. The contractor appealed and the owner of the property did not. In our opinion the justice had jurisdiction over the contractor for a personal judgment, and on his appeal the circuit court had jurisdiction to hear the case against him, the lien proceedings being void, were of no effect, and left the case against the contractor as though a lien had not been mentioned.

The judgment is reversed and cause remanded. All concur.

---

## H. H. HANENKRATT, Respondent, v. T. H. BROUGHAM, Appellant.

**Kansas City Court of Appeals, May 27, 1912.**

**PLEADING: Performance: Acceptance: Evidence.** Where a contract for work in grading is performed under the direction and supervision of the party having the work done, and as directed, and it is accepted by him, this is evidence of performance and not a waiver and a judgment under such evidence is supported by a petition alleging performance of the contract.

Digitized by Google

Appeal from Jackson Circuit Court.—*Hon. James H. Slover,* Judge.

AFFIRMED.

*Bruce Barnett* for appellant.

(1) Inasmuch as there was a confessed failure fully to perform the contract, plaintiff was not entitled to recover in this action in which the petition does not declare upon *quantum meruit* and does not plead any waiver of full performance, but declares upon the written contract, sets forth and pleads the same with particularity, and pleads full performance thereof. The decisions in this state are uniform that a plaintiff cannot plead performance of a contract and rely upon a waiver in any case except a suit upon an insurance policy. Thompson v. St. Charles County, 227 Mo. 220. (2) Likewise it is well established and the decisions of this state are uniform to the effect that recovery cannot be had upon *quantum meruit,* under a petition alleging full performance of the contract. Reifschneider v. Beck, 148 Mo. App. 725; Davis v. Drew, 132 Mo. App. 503; Cole v. Armour, 154 Mo. 333.

*Bowersock, Hall & Hook* for respondent.

(1) The contract did not obligate plaintiff to bring all streets to grade. Const. Co. v. Hayes, 191 Mo. 248; Davis & Rankin v. Hendrix, 59 Mo. App. 444; Williams v. Railroad, 153 Mo. 487; Tetley v. McElmurry, 201 Mo. 382. (2) The contract was fully performed by the plaintiff. (3) Even if not fully performed according to its terms, the work was accepted as a performance and plaintiff is entitled to recover under the contract. Aarnes v. Windham, 34 So. (Ala.) 816; Laycock v. Moon, 72 N. W. (Wis.) 372; Laycock v. Parker, 79 N. W. (Wis.) 372; Colby v. Franklin, 15 Wis. 311; Howard v. Oshkosh, 37 Wis. 242; Smith v.

Digitized by Google

Alker, 102 N. Y. 87; Wilkins v. Wilkerson, 41 S. W. (Tex.) 178.

ELLISON, J.—Plaintiff's action is based on a written contract for grading certain streets in Kansas City. He recovered judgment in the circuit court.

It appears that the contract was with defendant and another, the latter to pay for three-fourths of the work and defendant one-fourth. The petition alleges performance of the contract on plaintiff's part and defendant claims that the evidence shows non-performance and a waiver of performance, and that one "cannot plead performance of a contract and rely upon a waiver in any case except upon an insurance policy." [Thompson v. St. Charles County, 227 Mo. 220.]

That is a correct statement of the law as announced in this state. But plaintiff does not rely upon a waiver. Under the terms of the contract the grading was to be done by excavating at certain places and filling at others. There was evidence tending to show that the work was done under the supervision of defendant or his cocontractor and as directed; and that it was so done and was accepted and partly paid for. We think this is ample evidence of performance; indeed it is well nigh conclusive, notwithstanding excerpts from the testimony presented to us in defendant's brief.

This case was tried by the court without the aid of a jury and no declarations of law were given. Hence, if there is any evidence tending to support the judgment, on any theory of the case as presented, it must be affirmed. [Wischmeyer v. Richardson, 153 Mo. 556; Peoples' Nat. Bank v. Central Trust Co., 179 Mo. 648.] Under this familiar rule of law, we must affirm the judgment. All concur.

Digitized by Google

# LOLA B. McDONALD, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, May 27, 1912.

1. **STREET RAILWAYS: Personal Injury: Back to Car: Humanitarian Rule.** A person negligently walking down a street railway track with her back to an approaching car, was in plain view of the motorman for a length of time wherein he might have stopped the car. It was *held* she had a case for the jury under the humanitarian rule.

2. **———: ———: Instructions: Measure of Damages: Medical Attendance, Medicines and Nurse Hire.** Where the petition in a personal injury case, claims separate certain amounts for medical attendance, medicines and nurse hire, and asks a total sum of ten thousand dollars damages, it is error to instruct the jury to allow her damages and also for medical attendance, medicines and nurse hire in any sum not exceeding ten thousand dollars, without limiting the amount to that claimed in the petition for medical attendance, medicines and nurse hire.

3. **———: ———: ———: ———: Excessive Verdict: Remittitur.** Where the injuries consisted principally of bruises, some swelling, and sleeplessness for a time, as well as "severe pain," with no broken bones or limbs or other permanent injury, a verdict for $6000 was *held* excessive and ordered reduced to $4000.

Appeal from Jackson Circuit Court.—*Hon. James H. Slover*, Judge.

AFFIRMED (*conditionally*).

*John H. Lucas* and *Bruce Barnett* for appellant.

It has been held repeatedly in this state that where the petition alleges separately the amount of damages sustained on several elements or items of damage, the instruction on measure of damages should limit the amount of recovery upon each item to the amount alleged in the petition on such item. Radtke v. Basket & Box Co., 229 Mo. 1; Heinze v. Railways Co., 122

Digitized by Google

S. W. 346; Tinkle v. Railroad, 212 Mo. 471; Smoot v. Kansas City, 194 Mo. 522; Shinn v. Railways Co., 146 Mo. App. 718.

*Joseph P. Fontron* and *A. F. Sherman* for respondent.

Inasmuch as the case of Shinn v. United Railways has been certified to the Supreme Court, it can hardly be taken as an authoritative decision, and we believe that under the prayer of the petition in this case, and under the language of the instruction, that the case falls within the general rules laid down in the cases of Browning v. Wabash Railway Co., 124 Mo. 55; Wheeler v. Boles, 163 Mo. 398; Stutzke v. Consumers Co., 156 Mo. App. 1.

ELLISON, J.—Plaintiff was run upon by one of defendant's streets cars, and suffered injury for which she instituted this action. She recovered judgment in the circuit court for six thousand dollars.

Plaintiff's case is placed under what is known as the humanitarian rule. The evidence tended to show that defendant's railway consisted of a double track and that at the place where she was hurt there was a cinder pathway between the two tracks, commonly used by pedestrians. That plaintiff was walking along in the east track, with her back to the approaching car, while a companion was in the pathway, and had been for such time as to make clear that the motorman saw her, and by ordinary care could have avoided striking her. He gave testimony tending to excuse himself, but as the verdict was for plaintiff, we must accept her version of the matter as the facts of the case. In doing this we are of the opinion that notwithstanding her own negligence, she made a case for the jury under the humanitarian rule.

Digitized by Google

Besides her injuries, she claimed in her petition to have incurred expense of fifty dollars for medical treatment, five dollars for medicines, and twenty-five dollars for nurse hire, and "that she had been damaged by reason of the foregoing in the total sum of ten thousand dollars." In an instruction given at her instance the jury were authorized to find damages for her injuries, expense for medical treatment, medicines and nurse hire, "in all not to exceed ten thousand dollars."

The instruction is erroneous. It should have confined the jury, in allowing for expenses, to the amounts claimed. As written, any amount could have been allowed inside the limit of ten thousand dollars. [Radtke v. Basket & Box Co., 229 Mo. 1; Tinkle v. Ry. Co., 212 Mo. 445; Smoot v. Kansas City, 194 Mo. 513.]

Plaintiff, however, offers to remit the amount of the claims for expenses, and we would allow it to be done if there were no other just ground of complaint. But defendant we think is fully justified in attacking the verdict as being excessive. Six thousand dollars is altogether disproportionate, under all estimates made in judicial procedure, to the injury sustained. We cannot discover where she suffered any permanent serious hurt. Her testimony is very vague and indefinite. By reading it over we find ourselves not informed that anything of very serious consequence followed. She was bruised about the body by the collision and was made to lose sleep for some time after, and that her injuries "were very painful." There was nothing in the testimony of her physician, added to her own, to justify a verdict for six thousand dollars. A verdict of five thousand dollars, in a much more serious injury, was ordered reduced to four thousand dollars. [Richardson v. Ry. Co., 223 Mo. 325.] In another case where the injury was of more serious



Digitized by Google

consequence, a verdict of five thousand dollars was reduced by two thousand dollars. [Briscoe v. Met. St. Ry. Co., 222 Mo. 104.] In yet another case, involving injuries many fold greater than this plaintiff suffered, a verdict was reduced from $5500 to $3500. [Dent v. Traction Co., 145 Mo. App. 61.]

We have had many cases in this court in which a plaintiff with injury as great as this plaintiff's, has been satisfied with less than half of this verdict. But we recognize that, within the bounds of reason, the amount of damages which have no certain rule of ascertainment, must be left to the common sense of the jury; and therefore we are aware that different jurors would fix upon different amounts as compensation for like injuries. However, we have concluded it would be liberal to the plaintiff to allow this judgment to stand for four thousand dollars, and therefore if within ten days a remittitur of two thousand dollars is entered, the judgment will be affirmed; otherwise, it will be reversed and the cause remanded. All concur.

---

## ELIZA J. WILDER, Respondent, v. THE WABASH RAILROAD COMPANY, Appellant.

**Kansas City Court of Appeals, April 29, 1912.**

1. **NEGLIGENCE: Railroads: Death at Crossing.** Plaintiff sued for damages for the killing of her husband. He was riding a horse on the public road and attempted to cross the railroad track just after an engine, with two freight cars attached, had backed over the crossing and stopped about ten feet beyond. The engine without warning started forward frightening his horse which reared and plunged and threw him on the pilot. He made frantic but unsuccessful effort to save himself, but the engine moved forward a hundred and fifty feet or more, and he was then dragged under the wheels and killed. *Held*, that the evidence was sufficient to take the case to the jury.

Digitized by Google

2. ———: **Pleading: Humanitarian Doctrine.** The constitutive facts of a charge of negligence under the humanitarian rule are that the injured person was in a situation of peril; that the operators of the engine or car had actual or constructive knowledge of such peril in time, by the exercise of reasonable care, to avert the injury and that the injury was the result of their failure to exercise such care.

3. ———: ———: **Specific Acts.** Where specific acts of negligence are averred, recovery can be had on no other grounds.

Appeal from Macon Circuit Court.—*Hon. Nat. M. Shelton,* Judge.

REVERSED AND REMANDED.

*J. L. Minnis* and *Guthrie & Franklin* for appellant.

(1) Plaintiff's petition fails to state a cause of action. Gurley v. Railroad, 93 Mo. 445; Railroad v. Adams, 24 S. W. 839; Hennessey v. Railroad, 12 S. W. 608; Nivert v. Railroad, 232 Mo. 626. (2) The court should have required plaintiff to make her petition more definite, specific and certain. R. S. 1909, art. 5, chap. 21, sec. 1794; R. S. 1909, art. 5, chap. 21, sec. 1815; Gurley v. Land & L. S. Co., 163 Mo. 342; Rush v. Brown, 101 Mo. 589. (3) Defendant's demurrer at the close of plaintiff's evidence should have been sustained. Dyrcz v. Railroad, 238 Mo. 33, 141 S. W. 861; Newton v. Railroad, 152 Mo. App. 167; Waggoner v. Railroad, 152 Mo. App. 173; Veatch v. Railroad, 145 Mo. App. 232; Laun v. Railroad, 216 Mo. 563; Holland v. Railroad, 210 Mo. 338; Schmidt v. Railroad, 191 Mo. 215; Sanguinette v. Railroad, 196 Mo. 466; Gumm v. Railroad, 141 Mo. App. 306. (4) Plaintiff's petition states, if it states a cause of action at all, a common law action for negligence at a railroad crossing. It specifically states that deceased was in the exercise of due care and that he was killed by the negligence of the defendant. And while so pleading, the court instructed fully and plaintiff was permitted to recover under the humanitarian or last chance doc-

Digitized by Google

trine. This is error. The plaintiff must recover on the cause of action stated, if at all. Hufft v. Railroad, 222 Mo. 286; Black v. Railroad, 217 Mo. 672; Compton v. Railroad, 147 Mo. App. 414; Jacquin v. Cable Co., 57 Mo. App. 320. The evidence in this case shows conclusively that the last chance doctrine does not apply, even if it had been pleaded, which it was not. Newton v. Railroad, 152 Mo. App. 167; Waggoner v. Railroad, 152 Mo. App. 173; Veatch v. Railroad, 145 Mo. App. 232; Pennell v. Railroad, 153 Mo. App. 566.

*R. W. Burrow* and *Nat. M. Lacy* for respondent.

(1) Plaintiff's petition states a cause of action. Schneider v. Railroad, 75 Mo. 295; Mack v. Railroad, 77 Mo. 232; Sullivan v. Railroad, 97 Mo. 113; Page v. Railroad, 99 Mo. 400. (2) A motion to make a pleading more definite and certain is waived by answering over or participating in the trial, but the petition in this cause is good even as against such a motion. Page v. Railroad, 99 Mo. 400; Sauter v. Leveridge, 103 Mo. 615; Rinard v. Railroad, 164 Mo. 270; Dakin v. Mercantile Co., 197 Mo. 270.

JOHNSON, J.—Plaintiff, the widow of William L. Wilder, deceased, sued to recover damages for the death of her husband which she alleges was caused by the negligence of defendant in the operation of a train over a public crossing in the city of Macon. The answer, in effect, is a general traverse (Ramp v. Railway, 133 Mo. App. 700.) The trial resulted in a verdict and judgment for plaintiff in the sum of thirty-two hundred and fifty dollars and the cause is here on the appeal of defendant.

The death of plaintiff's husband occurred in the afternoon of September 28, 1910, within the corporate limits of the city of Macon at a place where several railroad tracks owned and operated by defendant crossed an east and west public street, or road, at

Digitized by Google

right angles. A locomotive headed south was switching back and forth at a time when Wilder approached the crossing from the east on horseback. He stopped to allow the train (which consisted of the engine and two freight cars and was backing north) to clear the crossing, and when the engine passed over the crossing and stopped at a point variously estimated at from four to ten feet north of the road, he proceeded to cross in front of the engine and his horse was on the crossing when the engine, without warning, started forward. Had the horse not become unruly, Wilder would have crossed in safety, but the horse became frightened, reared and plunged on the track and finally threw Wilder at a point thirty feet south of the middle of the road. Wilder fell on the pilot and made a prolonged and frantic but unsuccessful struggle to save himself. He emitted loud and terrified outcries but failed to attract the attention of the engine men. Finally, at a place over one hundred and fifty feet south of the middle of the wagon road, he was drawn under the wheels of the engine and killed. The speed of the engine did not exceed four or five miles per hour and there is evidence tending to show that at such speed the engine could have been stopped in from twenty-five to thirty-five feet. Evidently the engineer and fireman did not know of Wilder's peril and did not hear his outcries, though they were very loud, as their attention had been suffered to be diverted from the crossing. The failure of the engineer, who was seated on the west side of the cab, to see the horseman, no doubt, was due to the fact that owing to the obstruction of the boiler and the short distance the engine ran north of the road the horseman at no time was in the range of his vision, but there was nothing to prevent the fireman whose place was on the east side of the cab from seeing the horseman waiting near the track to cross as soon as the engine would allow him sufficient clearance. We have stated the principal facts of

Digitized by Google

the case in their phase most favorable to the cause of action asserted and now shall consider the question of their sufficiency to take the case to the jury.

We think the evidence justifies the inference as one of fact that had the operators of the engine been in the exercise of reasonable care they would have known of the presence of the horseman and would not have started the engine forward while he was in the very act of crossing and thereby imperiled his safety. This was a public crossing to the use of which Wilder's right was equal to that of defendant. Certainly with the engine at rest and, therefore, innocuous, the engineer should not have started forward without making a reasonable effort to ascertain whether or not he had a clear track. The fact that on account of the boiler head being in the way of his vision he could not see the crossing and the wagon road east of it gave him no right to assume that the way was clear. The fireman was in the east side of the cab where he could observe the conditions on that side of the track and considering that this was a public road crossing the duty of maintaining a reasonable lookout for danger devolved on both enginemen. To hold that in such case the engineer only is chargeable with the duty of looking ahead would be to hold, in effect, that a railroad company has a paramount right to the use of a public street and owes no duty to people rightfully using the crossing who are unfortunate enough to be on the blind side of the engineer. It is the duty of a railroad company to have eyes on both sides of the engine at such places and to make reasonable use of them.

But defendant argues, with much earnestness, that Wilder was guilty in law of contributory negligence. It has been iterated and reiterated by the appellate courts of this state that a railroad crossing, whether in the country or in a city, is a dangerous place—a danger signal of itself—and that travelers on the

Digitized by Google

public road must not essay to cross a railroad track without taking those precautions to insure their safety that would characterize the conduct of a reasonably careful and prudent person. Had Wilder attempted to cross ahead of a train moving towards the crossing and so close as to endanger his safety the cases cited by defendant would be applicable, but when he entered on the crossing the engine was at rest, was harmless and could not endanger him unless in disregard of their plain and obvious duty, the engineman started it forward. We think the inference is permissible that a reasonably careful and prudent person in the situation of Wilder would have assumed that the operators of the engine would not wantonly or recklessly injure him by starting up the engine when he was in plain view on the crossing. Under all the circumstances disclosed in the evidence the act of the engineer in starting and running blindly over the crossing exhibited a reckless disregard of the rights of the horseman and, therefore, was an act reasonable care could not anticipate. Wilder was not guilty of contributory negligence as a matter of law and we think his conduct was a proper subject for the jury to consider. The demurrer to the evidence was properly overruled.

Though the answer contains no sufficient plea of contributory negligence the cause was tried by the court and both parties on the theory that such negligence was one of the issues raised by the pleadings and in the instructions given at the request of plaintiff the cause was sent to the jury on two hypotheses, viz., first that the injury was caused by defendant's negligence while Wilder was in the exercise of due care for his own safety and, second, that should the jury believe that negligence of Wilder contributed to place him in a perilous position, still, plaintiff would be entitled to a verdict if the jury further believed that defendant saw or should have seen his peril in reasonable time to have saved him by stopping the engine.

Digitized by Google

The last of these hypotheses authorizes a recovery under what is known as the humanitarian doctrine and we concede the evidence is comprehensive enough to support a recovery on that hypothesis, but the trouble with the position of plaintiff is that the petition does not state the constitutive facts of such cause. The material allegations of the petition are as follows: "That on the 28th day of September, 1910, while the said William L. Wilder was in the act of crossing the defendant's said railroad at a public crossing in said city of Macon, Macon county, Missouri, and while in the exercise of due care on his part, the defendant by its agents, servants and employees while running and operating a locomotive and train of cars over its said railroad in said city and county, did so carelessly, negligently and heedlessly run, manage and conduct its said locomotive and train over its said railroad at and near said public crossing in said city and county, that by reason of said carelessness and negligence of defendant said locomotive and train of cars was caused to run against, strike and kill the said William L. Wilder."

It may be considered as settled in this state, though the Supreme Court has had difficulty with the subject, that "a case under the humanitarian doctrine and one for common law or statutory negligence are not so inconsistent that both cannot be stated in one count" of the petition. [Nivert v. Railroad, 232 Mo. 626; Shipley v. Met. St. Ry. Co., 144 Mo. App. 7.] The constitutive facts of a charge of negligence under the humanitarian rule are that the injured person was in a situation of peril; that the operators of the engine or car had actual or constructive knowledge of such peril in time, by the exercise of reasonable care to avert the injury and that the injury was the result of their failure to exercise such care. [Laun v. Railroad, 216 Mo. 563; Grout v. Railway, 125 Mo. App. 552.]

Digitized by Google

The petition fails to allege these facts, or their legal equivalent. No rule is better settled than that which holds a plaintiff to a recovery upon the specific acts of negligence averred and upon no other. Obviously the instructions enlarged upon the proper scope of the petition and authorized a verdict for plaintiff on an act of negligence not pleaded. This is reversible error. Accordingly the judgment is reversed and the cause remanded. All concur.

---

## JAMES GEORGE, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

**Kansas City Court of Appeals, May 13, 1912.**

**JUSTICE COURTS: Appeal and Error.** Plaintiff obtained judgment in a justice court. Defendant filed an affidavit for appeal, but no bond. The appeal was allowed and plaintiff filed a motion to dismiss in the circuit court which was sustained, defendant claiming that it was excused from giving a bond because its property was in the hands of receivers. *Held*, that the law recognizes no excuse and the motion was properly sustained.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

AFFIRMED.

*John H. Lucas* and *Charles N. Sadler* for appellant.

(1) The circuit court erred in dismissing the appeal of appellant from the justice of the peace. R. S. 1909, sec. 7579; Drake v. Gorrell, 127 Mo. App. 636; Kraas & Thurman v. Shipp, 69 Mo. App. 46; Hull v. Beard, 80 Mo. App. 200; Bailey v. Kelley, 38 Mo. App. 623; Kermis v. Distilling Co., 79 Mo. App. 114.

Digitized by Google

*L. A. Laughlin* for respondent.

The claim that defendant had no opportunity given to it, to file a bond, has no foundation in fact. Defendant had from October 12, 1911, the date when the motion to dismiss the appeal was filed, until November 11, 1911, the date the motion was determined, in which to file an appeal bond. When defendant refused to file a bond the court entered the only judgment authorized by the statutes and dismissed the appeal. R. S. 1909, sec. 7580; Pullis v. Pullis, 157 Mo. 565.

JOHNSON, J.—Plaintiff brought an action for damages against defendant on September 21, 1911, before a justice of the peace. A trial was had October 4, 1911, resulting in a verdict and judgment for plaintiff. October 6, 1911, defendant filed an affidavit for appeal to the circuit court but filed no appeal bond and on that date the justice allowed the appeal. October 12, 1911, and after the cause had been transmitted to the circuit court, plaintiff filed a motion to dismiss the appeal on the ground that defendant had failed to file an appeal bond.

The motion was heard November 11, 1911, and the only evidence offered by defendant was an affidavit to the effect that on June 11, 1911, a United States Court in an action pending therein appointed receivers who under the order of appointment took possession of all of the assets of defendant and had them in their possession at the time of the taking of the appeal and of the hearing of the motion, and that on account of the receivership it was impossible for defendant to give an appeal bond. Defendant did not tender or even offer to give a bond and the court sustained the motion to dismiss on the ground that "the defendant gave no appeal bond." Defendant appealed to this court from that judgment.

Digitized by Google

The statutes require a resident appellant to file his affidavit and bond for appeal within ten days after the judgment was rendered against him in the justice court. [Section 7567 *et seq.*, Revised Statutes 1909.] But section 7580 provides: "No appeal allowed by a justice shall be dismissed for want of an affidavit or recognizance, or because the affidavit or recognizance given is defective or insufficient, if the appellant or some person for him will, before the motion to dismiss is determined, file in the appellate court the affidavit required, or enter into such recognizance as he ought to have entered into before the allowance of the appeal, and pay all costs that shall be incurred by reason of such defect or omission, with respect to such affidavit or recognizance."

As the affidavit was filed and the order allowing the appeal was made within ten days after the judgment was rendered, the circuit court, under the express provision of section 7580 acquired jurisdiction of the case. [See Clapper v. Bradshaw, decided at this term, and cases cited.] But the fact that the cause became lodged in the circuit court did not relieve defendant from the necessity of complying with the imperative statutory command to give a sufficient appeal bond. The legislative intent expressed in section 7580 is that an appellant shall not be cast out of the circuit court on account of an innocent blunder committed in an inferior court where technical accuracy is not to be expected but that the appellant must rectify the blunder before he shall be allowed to proceed in the circuit court. When plaintiff filed his motion to dismiss the appeal on the ground that no bond had been given, the duty devolved on defendant to tender a sufficient bond before the determination of the motion. Instead of performing this plain duty defendant took the position in the circuit court, and occupies the same position here, that its pecuniary distress absolved it from compliance with the statutes. The statute recog-

Digitized by Google

nizes no excuse. A person allowed to sue as a poor person in the justice court cannot perfect an appeal to the circuit court without giving the statutory bond before the motion to dismiss the appeal is determined (Hyatt v. Wheeler, 101 Mo. App. 357), and neither can a corporation discredited by a receivership escape compliance with the statute. The right to an appeal is purely statutory and since defendant did not comply with the statute, the circuit court could not have done otherwise than dismiss the appeal.

The judgment is affirmed. All concur.

---

## STATE OF MISSOURI, Respondent, v. E. H. CHINN, Appellant.

**Kansas City Court of Appeals, May 13, 1912.**

1. **EVIDENCE: Leading Questions: Discretion of Court.** A trial judge may exercise a sound discretion in ruling on objections to leading questions and the appellate courts will not interfere with such rulings unless it appears that there was an abuse of discretion.

2. **WITNESSES: Local Option: Impeachment.** When a defendant in a criminal proceeding offers himself as a witness his credibility may be assailed by proof that he bears the reputation in the community of being guilty of offenses analogous to that for which he is being tried.

Appeal from Boone Circuit Court.—*Hon. N. D. Thurmond,* Judge.

AFFIRMED.

*O. S. Barton, W. H. Rothwell* and *McBaine & Clark* for appellant.

*E. C. Anderson* and *W. H. Sapp* for respondent.

Digitized by Google

JOHNSON, J.—Defendant, a druggist in Rocheport, Boone county, was indicted, tried and convicted on a charge of selling one pint of whiskey to the prosecuting witness in violation of the Local Option Law. He appealed and the only errors he assigns in his brief relate to the rulings of the trial court on evidence. First, he contends the court erred in allowing a leading question to be asked by the prosecuting witness over his objection. The question, objection and answer were as follows:

"Q. I will ask you what, if any, whiskey you bought of Dr. E. H. Chinn during the month of July, 1910?

"By Mr. Barton: We object to the leading form of the question." Which objection the court overruled and to the action of the court the defendant and his counsel then and there at the time duly excepted and saved his exceptions.

"A. I bought one pint of whiskey."

Conceding that the question was leading it does not follow that the overruling of the objection offered by defendant is reversible error. A trial judge may exercise a sound discretion in such matters and the appellate courts will not interfere with rulings on leading questions except in cases where it appears there has been an abuse of discretion. We do not think defendant could have been injured by the form of the question and find the trial court acted within the bounds of its discretion. [State v. Napper, 141 Mo. 401; State v. Bateman, 198 Mo. 212; State v. George, 214 Mo. 262.]

Second, defendant insists that the state was permitted over defendant's objections to ask improper questions of witnesses introduced for the purpose of impeaching defendant after he had testified in his own behalf. The questions elicited testimony to the effect that defendant's reputation in the community as

Digitized by Google

a violator of the Local Option Law was bad and were not addressed to special instances of law breaking.

The rule in this state is that when a defendant offers himself as a witness his credibility may be assailed by proof of the fact that he bears the reputation in the community of being guilty of offenses against the law analogous to that for which he is being tried. Chronic law-breaking is a practice so immoral as to evince a lack in the offender of sufficient moral principle to enable him to tell the truth, especially in a case where the truth would hurt him. [State v. Oliphant, 128 Mo. App. 252; State v. Wilson, 152 Mo. App. 61; State v. Snider, 151 Mo. App. 699; State v. Christopher, 134 Mo. App. 6; State v. Shield, 13 Mo. 236; State v. Pollard, 174 Mo. 607; State v. Beckner, 194 Mo. 281.]

We hold the evidence was admissible.

The point made by defendant that the court "committed error in not confining evidence of appellant's character to his reputation prior to the filing of the indictment" was not included in the objections offered to the evidence and, consequently, is not before us.

The judgment is affirmed. All concur.

---

## CHARLES I. HULSE, Respondent, v. HOME TELEPHONE COMPANY, Appellant.

**Kansas City Court of Appeals, May 13, 1912.**

1. **TELEPHONE: Linemen: Master and Servant.** The relation between telephone companies and their linemen is no different from the ordinary relation between other masters and servants in the same or like situation and circumstances. The rule in some other states not followed in this state.

2. **TELEPHONE POLES: Dead Wires: Inspection: Foreman.** Where a lineman of experience, in the employ of a telephone

Digitized by Google

company, knows that his foreman has not inspected a pole, and that separate inspectors are not kept by the company, and is directed by the foreman to go alone to another pole while the foreman climbs one by which they are standing, it becomes his duty to inspect the pole for himself. And if on climbing it and cutting out "dead wire," it falls by reason of being rotten at the ground on the inside, though looking fair on the outside, he cannot hold the company liable for his injury.

Appeal from Buchanan Circuit Court.—*Hon. W. K. Amick,* Judge.

REVERSED.

*Wm. E. Stringfellow* for appellant.

*Jno. D. McNeely* and *B. J. Casteel* for respondent.

ELLISON, J.—Plaintiff was what is known as a "line man" in the defendant telephone company's employ in the city of St. Joseph, Missouri. He climbed a pole to which defendant's wires were attached, for the purpose of cutting "dead wires." When he cut the wires the pole was left without some of its support and fell with plaintiff to the ground, injuring him severely. He recovered judgment in the trial court.

Defendant's chief objection is that the case made for plaintiff by the evidence in his behalf, is insufficient in law to support a judgment. It appears from the testimony introduced by plaintiff that defendant operated a telephone line in the city of St. Joseph, Missouri, and that he was a lineman of ten years' experience and had been working for defendant for several months. That on the morning he was hurt, the defendant sent him and another lineman and a groundman (a man who worked on the ground) to cut out, or cut off of the poles, what is called "dead wires." The other lineman was in charge or control of the

Digitized by Google

work and plaintiff designated him as the foreman and so we will treat him. On the morning of October 8, 1909, he and the two others were sent out in a wagon with tools to cut out dead wires. The mode of work, suggested by the foreman, was for him to climb the first pole while plaintiff climbed the next one further on; the foreman was to cut the dead wires and plaintiff, seeing the foreman cut the wires, would then cut the same on his pole. The foreman was then to descend, pass plaintiff at his pole and go on to the next, when he was to climb it and cut wires as before, then plaintiff was to go by the foreman to the next pole and go through the same work. Thus they were to alternate. When they arrived at the place, to begin work on the morning in question, the foreman said he would go up the pole at which they were standing and plaintiff would go to the next one, which was about one-half block further on, and when he saw that the foreman had cut the wires, he, plaintiff, would cut the same ones at his pole. The third, or groundman, was sent to a house opposite to plaintiff's pole and across the street from it, where he was to go up a ladder on a porch and cut a couple of wires that ran over from plaintiff's pole. Plaintiff went down to the next pole as directed. He said "I walked up against the pole and give it a couple of shakes and it seemed to be solid, so I went up;" and that "that was the customary inspection." After going up, he cut the wires the foreman had cut and then reached over to cut the wires the groundman had been directed to cut. The reason he gave for cutting these was that he got to them before the groundman across the street got to the other end of them, and that when he "cut, it let me into the street;" that is, when he cut these wires the pole only being supported by wires running in another direction, fell, and he received his injuries. It was then seen that while the pole looked sound at the

Digitized by Google

bottom, it was so rotted on the inside as to be unable to stand after the supporting wires running across to the house, were cut.

In many of the states the rule is stated, absolute, that a telephone company is not expected to have inspectors of its poles other than the linemen themselves. [Sias v. Consolidated Lighting Co., 73 Vt. 35; McIsaac v. Northampton Electric Lighting Co., 172 Mass. 89; Tanner v. New York, N. H. & H. R. A., 180 Mass. 572; DeFrates v. Chicago Union Tel. Co., 243 Ill. 356; Krimmel v. Edison Illuminating Co., 130 Mich. 613; Lynch v. Saginaw Valley Traction Co., 153 Mich. 174; Griffin v. New York Tel. Co., 125 N. Y. Supp. 642; Saxton v. Telephone Co., 81 Minn. 314.]

Other states make no distinction between telegraph and telephone companies and their linemen, and any other relation of master and servant and, except where the situation and nature of the service may be different, require the master in such case to furnish the servant with reasonably safe appliances and a reasonably safe place in which to work. In an elaborate opinion by WOODSON, J., in which there is a full examination of the authorities, wherein all phases of the question are discussed, this state is placed in the latter class. [Corby v. Telephone Co., 231 Mo. 417.] In speaking of directions given by the foreman to the linemen in that case, the judge said that "the telephone company owed them the same duty to inspect and furnish them with a reasonably safe place in which to work that all other masters owe to their servants in that regard." And further, that: "There is not a whit's difference in principle between a telephone company and any other master in that regard." And that telephone companies (italics ours): "Owe the same duty to their employees that all other masters owe to their servants *under like circumstances and conditions.*"



Digitized by Google

Each of the contending parties in this case insists that the rules stated in that case determine the controversy in his favor. In view of this, we will compare the facts of the two cases. In the Corby case the plaintiff was one among several linemen, in charge of a foreman, all of whom (as here) were engaged in cutting wires from poles. The foreman went in advance of the men and inspected the poles and marked out work for the linemen and pointed out to them which poles were not safe and which ones they should climb. That the foreman had not actually inspected the pole plaintiff climbed, though the latter supposed he had and relied upon it; and the foreman stood by as he climbed up and handed him a hand-ax with which to do some work up the pole.

Excepting that the same character of work was being done, the foregoing facts bear little resemblance to those we have stated in this case. There is no pretense that plaintiff's foreman made any inspection and the face of the record shows that plaintiff *knew* he had not. In this respect the case is wholly unlike that of Miller v. Tel. Co., 141 Mo. App. 462, where the foreman declared the pole to be safe and for the plaintiff to climb it. So, likewise, it is apparent that plaintiff knew the defendant had not a separate force of inspectors, for he had been working for defendant for more than five months, and he stated he knew it did not inspect. In this case, as soon as they came to the place to begin work and before the foreman was out of his presence, he sent plaintiff to the next pole further on, telling him not to cut the wires until *after* he had cut, as the pole he was going to climb looked as though it might not support him. Plaintiff's words were, "and he (the foreman) told me to go down to the corner and cut what he cut and *wait* till he got his cut *for the pole looked kind of weak he was on.*" From this it is apparent that plaintiff knew the fore-

Digitized by Google

man had had no opportunity to inspect other poles and that no inspection was contemplated except that given by the linemen themselves. This is made still clearer by what the plaintiff did when he reached the pole. He says "I kind of walked up against the pole and give it a couple of shakes and it seemed to be solid, so I went on up." And he stated that that was the usual inspection, and he had not in all his nine years' experience seen any other made "as long as the pole shook solid." This seems to us to make clear that he did not consider the foreman had inspected and that he *did* consider he should inspect for himself. But there is no necessity for merely drawing conclusion in this important particular, for plaintiff expressly testified that he knew defendant never inspected, that they did "not pay any attention to it, just let it go. They never went and looked around to see if anything was falling down or not that I know of."

Plaintiff's nine or ten years' experience as a lineman had taught him, as he himself stated, all about the liability of poles to decay next to the ground, and there was no excuse for him to say, and he did not say, he expected and relied upon an inspection by the defendant, and his own acts demonstrate that. So the words of the foreman accentuated it when he expressed misgivings about his own pole; and when he sent plaintiff alone to the pole further on, it was no more than if he had sent him out from the company's office. The circumstances point to only one reasonable conclusion; that is, that plaintiff was to look out for himself. The direction of the foreman to go to that pole was in effect a direction to do his own inspecting independent of any reliance on the foreman. If the foreman had said to him, as he started, "I have not inspected that pole," it would have been no more warning and have added no more knowledge than plaintiff already had; and therefore it is not a matter of wonder that plaintiff does not say he *relied upon,* or *expected,* an

Digitized by Google

inspection from any one else. It was shown—plaintiff himself so stated—that an ordinary way of testing decay at the bottom was either to take the dirt away with a shovel, or drive in a chisel or screw driver; and it was shown that these tools were in the wagon. Counsel say that plaintiff tested the pole "all he could with the means at hand." But the record does not bear out the statement. Plaintiff said he tested it in the usual way and he thought sufficiently. But it was shown, if he wished any other test, the tools *were* at hand in the wagon.

So it seems to us to be clear that if we refuse to make exceptional rules for governing the conduct of telephone and telegraph companies and their linemen, and apply to them the ordinary obligations and mutual duties between master and servant in ordinary cases, in similar circumstances and conditions, as held and applied by the Supreme Court in the Corby case, we must hold that the evidence in plaintiff's behalf shows him to be without legal standing and the judgment should be reversed. All concur.

---

## E. C. WHITE, Appellant, v. M. O. ANDERSON, Respondent.

**Kansas City Court of Appeals, May 13, 1912.**

1. **USURY: Loan: Concealed.** A loan is the foundation upon which a charge of usury must rest, and if this element does not appear in the transaction, usury is not in it, no matter what may be the price exacted. The law will get under and expose any disguise in its quest for usury.

2. **———: ———: Credit: Guarantor: Indorser.** One may pledge his credit for another by way of guaranty, indorsement, or otherwise, and charge what he likes without being guilty of usury, if he has no interest in the loan.

Digitized by Google

3. ———: ———: **Coupon Tickets: Merchandise: Credit.** A party carried on the business of selling coupon ticket books to persons who could not obtain credit at stores, with which any kind of merchandise might be purchased of merchants to whom the books were addressed. The purchaser of the book would give his note, due in thirty days, for the price of the book plus five per cent, with eight per cent interest from maturity. The party issuing the coupon books would settle with the merchants to whom they had been addressed and who had taken them up by furnishing merchandise, by paying to the merchants the amount called for, less ten per cent. It was *held*, that this was not a sale of credit for a rate per cent commission, but was, in reality and effect, a loan to the person purchasing the coupon book, and was usurious.

Appeal from Pettis Circuit Court.—*Hon. H. B. Shain*, Judge.

AFFIRMED.

*G. W. Barnett* for appellant.

*Geo. W. Anamosa* for respondent.

ELLISON, J.—This is a contest in replevin for a horse which defendant mortgaged to plaintiff, and plaintiff's right depends upon the validity of the mortgage. The judgment in the trial court was for the defendant.

The mortgage was given to secure the payment of two promissory notes, each for ten dollars and fifty cents due in thirty days with eight per cent interest from maturity. The case was submitted to the court without a jury. It appears that plaintiff conducts a general business in Sedalia under the name of the "Credential Coupon Trading Company," whereby he issues a small book of coupon tickets, for a sum not exceeding ten dollars, to those who desire to purchase clothing, groceries, etc., at certain designated stores in that city. A person without credit of his own at the store where he wishes to make purchases, will pur-

Digitized by Google

chase of plaintiff one or more of these coupon books and, as in this case, give his note or notes, due in thirty days, to plaintiff, for the amount represented in the coupon book with five per cent in addition. Thus, if he wishes to make purchases amounting to twenty dollars, as in this case, he will get two coupon books with coupon tickets in each aggregating ten dollars, for which he will execute his two notes, as in this case, for ten dollars and fifty cents each. He may then go to the stores and make purchases, paying with tickets out of his book, the merchant making no charge to him. The merchant retains all tickets thus received by him, charging them to plaintiff, and the latter pays, or redeems, them by paying ten per cent less than the sum total of the tickets. Thus, if a certain merchant has one hundred dollars in tickets, plaintiff may take them up, in accordance with an understanding he has with the merchant, by paying ninety dollars in money.

Defendant was in need of an overcoat and was without money and had no credit at the clothing stores, and applied to plaintiff for two of his coupon books of ten dollars each, and executed as security for the payment thereof his two promissory notes for ten dollars and fifty cents each, secured by the chattel mortgage as has been already stated. With these he went to one of the stores which, under an agreement with plaintiff, take up his tickets, and bought an overcoat for twenty dollars, and plaintiff afterwards redeemed them from the merchant by paying eighteen dollars, thus receiving his ten per cent discount, as agreed with the merchant. It is, however, agreed that the price charged defendant by the merchant was the proper retail price, it being admitted that the coat was "of the value of twenty dollars." It was further admitted that the matter of time defendant's notes were to run was not taken into consideration as a basis of the amount of commission to be paid plaintiff; it being admitted "that plaintiff's terms to every person to

Digitized by Google

whom credit and accommodation of like character were and are extended are five per cent on the total amount or value furnished to any person whether the time to elapse before settlement be for one day, or for six months, or one year, or any other time as might be agreed upon."

The coupons could not be used as money, nor received in payment of the holder's debts, nor for any purpose other than the purchase of merchandise.

From this statement it is seen that plaintiff was compensated in these transactions by five per cent of the amount of the coupon book, received from the purchaser, and ten per cent of the sale price of the goods, received from the merchant; and the question for decision is, is this usury?

It is said in State ex rel. v. Boatmen's Savings Inst., 48 Mo. 189, that, "In order to constitute usury there must be an express or an implied loan." [Coleman v. Cole, 158 Mo. 253.] Our statute (Sec. 7182, R. S. 1909) includes "the forbearance," as well as the use of money; so that though a note might not be usurious before maturity, it might become so by forbearance at an unlawful rate, after that. If there is a loan in which there is more profit secured to the lender than the rate of interest allowed by law, the courts will pronounce it usurious however well disguised and concealed it may be. [Missouri Real Est. Syndicate v. Sims, 179 Mo. 679.] We have had occasion to say the ingenuity of men has been put to the test in devising ways for evading the usury law, and the courts are found ever ready to thwart all efforts in that direction. Money is so indispensable to the use of men, its value and convenience are so alluring—the temptation to acquire it so great—that the law has guarded against imposition so readily practiced upon the needy and the improvident. It is a singular phase of human nature that the shrewdest and wariest trader loses his cunning when he assumes the role of a bor-

Digitized by Google

rower, and becomes an easy victim to the usurer. But whatever the reason, the law will permit one to sell his horse for whatever he may get without fraud or deceit, or to hire out his vehicle or his labor for whatever the hirer will pay, yet when it comes to the hire of money, the utmost circumspection is required by the law to protect the improvident or the needy borrower. The prohibition of the law is, however, confined to cases of loans whereby greater than the prescribed rate of interest is sought. If it has not in it the element of a loan, there canot be usury. Any real (not pretended) sale is not usury, however great the per cent of profit. Usury and that species of exorbitance from which equity sometimes relieves, viewed from a legal standpoint, are wholly unlike and belong to different branches of the law. It is common knowledge that there are sales of many kinds of merchandise where there is a hundred and more per cent of profit.

It has been held that the sale, in good faith, of an indorsement, the purchase price being three per cent of the amount of the note, was valid. [Ketchum v. Barber, 4 Hill 224; Beckwith v. Windsor Mfg. Co., 14 Conn. 594.] And that there might be a valid sale of a guaranty at whatever price. [More v. Howland, 4 Denio 264.] So it is familiarly known that much of the business of the country is carried on by the sale of notes at whatever per cent of discount is agreed upon, with no thought of the objection of usury.

So undoubtedly one may sell his credit as he would any other species of his property. If, for instance, A should come to B and say, I want to borrow $100 from C, who fears to trust me, and if you will sign as my security I will pay you five dollars and B does so, having no interest in the transaction except as stated, why is it not a legal contract? B is not interested in the loan, nor does he get any interest on it. And it could make no difference that C had promised to pay

Digitized by Google

B five per cent of the loan instead of a named sum. In a leading case in New York it was said that, "neither sales of credit nor loans, or sales of property, other than money are touched by the statute. It is not enough that the vendee wants money, and that this is known to the opposite party. Neither the necessities of the vendee, nor the use he contemplates making of his purchase, will deprive the vendor of his right to determine for himself the terms upon which he will part with his property. His conduct may be oppressive; but all extortion is not usury. Nor can a penal statute, designed to correct a particular evil, be made a remedy for the violation of all duties of imperfect obligation." [Dry Dock Bank v. Amer. Life Ins. Co., 3 Const. 344.] The same rule is stated in Brown v. Harrison, 17 Ala. 774. In Ketchum v. Barber, supra, l. c. 234, after a review of the authorities, Ch. J. Nelson said: "We may, I think, safely conclude that a guaranty of paper unconnected with a loan, and really and *bona fide* intended to be what it purports to be on its face, viz., a security for payment . . . is not obnoxious to the imputation of usury, even if a commission of more than legal interest be agreed upon and taken for the same." Again, at page 235, he said that: "An extravagant charge for a guaranty, purely as such, is no more usury within the sense and meaning of the law, than if exacted or given for any article of commerce. The price of a note, bill or bond, bought in the market, is but so much given for the credit of a name; and this is an every day transaction."

In Dunham v. Dey, 13 John. 40, 48, the court saw nothing improper in an endorser or a surety taking a percentage "for advancing their responsibilities."

We cannot see that the facts in this case put it in any of the foregoing classes. It is said to be a mere sale of credit. If it were, we could well sustain a price which, in a loan, would be usury. But we think it not a mere sale of credit. A lack of credit in defendant

Digitized by Google

induced the transaction resulting in a loan of money at a forbidden hire. When defendant bought his book of credit coupons, he was enabled to use it in payment for the purchase price of goods. *He* did not owe for the goods, but *plaintiff* did. The transaction was no less than if plaintiff had gone to the store with defendant and then and there paid the merchant for the coat and taken defendant's note just as he did take it. That defendant gave his note to plaintiff and received from him the coupon orders for goods (and that, in reality, is what they were) before going to the store, does not influence the fact that he bought and paid for the goods with plaintiff's money; and that plaintiff paid the money over to the merchant instead of defendant, cannot relieve the transaction of its true character, since it would have been idle to hand the money to defendant and then see that the latter passed it over to the merchant. The one important feature which the transaction lacks of being a sale of credit, such as in the sale of a guaranty or indorsement, is that in those instances there is no advance of money made by the guarantor or indorser to or for the party guaranteed or endorsed and he still owes the debt; while in this case there is an advance of money for the defendant by the plaintiff in full discharge of his debt and he does not owe anything to the merchant, but does owe the plaintiff. When he gave plaintiff his note, ostensibly for the coupons, it was, in reality, for the money which plaintiff used in paying for the goods.

We conclude with the trial court that the notes are usurious, which under the statute rendered the mortgage void, and the judgment must therefore be affirmed. All concur.

Digitized by Google

# STATE OF MISSOURI ex rel., Relator, v. H. C. GILBERT et al., Judges of the County Court of Jackson County, Respondents.

**Kansas City Court of Appeals, June 3, 1912.**

1. **DRAMSHOP LICENSE: Remonstrance: Appointment of Commissioner.** Where an application for a license to keep a dramshop is contested by a remonstrance, it is not improper for the county court, on agreement of the parties, to appoint a competent person to meet with the parties or their attorneys to canvass the names of petitioners and remonstrants, to sift out the names of those agreed to be incompetent signers and those agreed to be qualified.

2. **———: ———: County Court: Certiorari: Jurisdiction: Mistakes.** The county court has exclusive jurisdiction in the matter of granting dramshop licenses and so long as its record shows that it did not go beyond its jurisdiction in the procedure for a license and in granting the license, its decision cannot be questioned by writ of *certiorari*. Errors or mistakes in law or fact cannot be questioned or corrected in such procedure.

## Original Proceedings. Certiorari.

ANNULMENT OF LICENSE REFUSED.

*H. S. Williams* for relator.

*J. G. L. Harvey* and *Cooper & Wilson* for respondents.

ELLISON, J.—The county court of Jackson county granted a license to W. H. Dixon to keep a dramshop at 915 Walnut street, Kansas City, Mo., for six months from January 4, 1912. Whereupon certain objectors obtained from this court a writ of *certiorari*, whereby it is sought to annul the license.

It appears that in proper time Dixon filed with the county court of Jackson county, Mo., his application for a license to keep a dramshop at 915 Walnut

Digitized by Google

street, Kansas City, Mo., for a period of six months from the 4th day of January, 1912. A petition purporting to be signed by properly qualified petitioners and sufficient in number, accompanied the application. Thereafter, on the 29th of December, 1911, a remonstrance was filed with the court against granting the license. Those signing the remonstrance denied the qualification as legal petitioners of numbers of those signing the petition; and alleged, as a matter of fact, that the names of qualified petitioners appearing on the petition did not constitute a majority of the assessed taxpaying citizens, and guardians of minors, owning property in the block where he sought to have his dramshop.

It appears by the record that there were a large number of petitioners and remonstrants, and the legal qualifications of these, under the provisions of the statute, involved the investigation of so many names it was agreed by the applicant and the remonstrants that the court should appoint the county license inspector to canvass the names with the respective attorneys, and ascertain those which could be agreed upon as qualified petitioners in the block who had signed the petition, and those in the block qualified to sign petitions but who had not done so. The inspector and the respective attorneys came together and canvassed the names. But while the attorney for the remonstrators agreed there were 158 qualified petitioners on Dixon's petition, the balance were challenged. When the canvass of the qualification of the names of the remonstrators was begun, disagreement soon became apparent, the attorney for the remonstrators asserting that under the claim of the attorneys for the applicant as to the qualifications necessary for a remonstrant, there were only about twenty names on his list, and he therefore declined to proceed further. Thus the canvassing ended and the inspector so reported to the court.

Digitized by Google

The remonstrators then moved the county court to strike out the inspector's report, on the ground, first, that they had admitted certain names signed to the petition were qualified peitioners when, under a ruling of that court, they were not legal petitioners; and, second, that the applicant had made frivolous objections to names on the remonstrance to the effect that citizens, otherwise qualified, who were tenants under leases that prohibited them from signing a dramshop petition, "were not to be counted as not on said petition on account of said lease." And, third, "because the appointment of a referee was not provided for by law but was merely a suggestion of the court and was not binding on the parties to the contest."

That motion was overruled by the county court "for the following reasons," as stated in the record: "First, that the said referee was appointed at the request and with the consent of all parties. Second, that after said report of said referee was filed, it was agreed by all parties in open court that said report was true and correct." It is then recited in the record that, "Whereupon said attorneys for the remonstrators refuse to go on further with the case."

The record then recites that Dixon's application was taken up for hearing by the court, that evidence was heard and a finding made that the applicant was a properly qualified person to keep a dramshop and that his petition was signed by a majority of the assessed taxpaying citizens, and guardians of minors, owning property in the block in which the dramshop is to be kept. All other findings were made by the court as to the requisites made necessary by the statute having been complied with. In short, the record entry of the findings and judgment of the court shows a regular and legal procedure for a dramshop license and ends with an order that a license be issued.

The only reason given by relator against the validity of the license, in his petition for the writ, is

Digitized by Google

that the county court granted the license without hearing evidence as to the qualification of signers of the petition and remonstrance, although it was demanded that such evidence be heard. The record returned does not support this allegation; but on the contrary, refutes it.

And the sole objection made against the proceeding of the county court, as set forth in brief of points and authorities, is that the court "had no authority in law to appoint a commissioner or referee to act in place of the court to canvass names on the petition and remonstrance."

There are two reasons why we cannot sustain the objection. First, the record shows that this was done at the request and by the consent of the parties and that all appeared before the commissioner to canvass names, and no objection appears to have been made to the right of the court to appoint him, until after he made his report. It was stated, and not questioned, that in Jackson county there are near six hundred saloons licensed. It is readily seen that contests over the qualification of each signer of a petition for, or a remonstrance against, a license, could be such as to make an extended hearing by the court impracticable. We therefore do not see any legal objection to the court appointing some competent person, when requested by the contesting parties, to canvass the names of petitioners and remonstrants and agree upon those who are legally qualified. The person appointed would not usurp the functions of the court nor bind it to a certain decision. As a practical matter, in the disposal of such business, the court would, doubtless, accept the agreement of the contesting parties in determining whether the petition was properly signed.

Second, in this case there is nothing in the record to show that the inspector in any way assumed to say whether the applicant was, or was not, entitled to a license. He made no finding whatever, not even stat-

Digitized by Google

ing whether the petition contained the requisite number of petitioners. On the contrary, so far as appears by the record, the county court, after a regular hearing, made its finding from the law and the evidence.

Under the writ of *certiorari,* we can only examine the record sent up, and if it shows that the proceedings were of matters over which that court had exclusive jurisdiction, as is the case with dramshop licenses, and that it has not exceeded that jurisdiction, we cannot interfere. We cannot entertain an appeal from the decision of that court to see if it made a mistake in law or fact. If that could be done, we would find ourselves under the necessity of considering whether proper evidence was heard and proper conclusions were reached. By doing this we would overreach our own jurisdiction. We have nothing to do with the propriety of the court's action, or the correctness of its decision, so long as it acts within the limit of its jurisdiction. [State ex rel. v. Cauthorn, 40 Mo. App. 94; State ex rel. v. County Court, 45 Mo. App. 387; State ex rel. v. Mayor, etc., 57 Mo. App. 192.] The validity of the county court's action must be adjudged by what is shown upon the face of its record. [State ex rel. v. Patterson, 229 Mo. 364, 368; Ward v. Board of Equalization, 135 Mo. 309, 319; Hannibal & St. Joe Ry. Co. v. State Board, 64 Mo. 294.]

So far as is shown by the record in this case, the license was properly granted, and the action of the county court will not be disturbed. All concur.

Digitized by Google

# FIFTY-THIRD NATIONAL BANK OF CINCINNATI, Appellant, v. PHIL H. McCRORY et al., Respondents.

Kansas City Court of Appeals, June 3, 1912.

1. **NEW TRIAL: Weight of Evidence: Discretion.** When a new trial is granted on the ground that the verdict is against the weight of the evidence, if there is any evidence of substance in favor of the party against whom the verdict was rendered, the discretion of the trial court will not be disturbed by an appellate court.

2. **———: ———: ———: Promissory Notes: Indorsee: Circumstances.** Where a payor and payee of promissory notes lived a long distance apart, and the payor by agreement paid the notes by substituting notes of third parties, but they were not returned to the payor when paid, and an indorsee living in another state claimed to be the owner for value before due and without notice. *Held*, that the circumstances of the payor living a distance from the party claiming to be the innocent holder, and that the indorsee did not notify him of being the indorsee for near six months after they were due, and then of only one of them, were sufficient to uphold the discretion of the trial court in granting a new trial.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas*, Judge.

AFFIRMED.

*Ellis Cook & Barnett* for appellant.

The plaintiff by production of the notes and proof of the indorsements made a prima facie case without even the evidence of J. H. Youtsey. Ashbrook v. Letcher, 41 Mo. App. 369. Hearsay evidence is incompetent to establish any specific fact which in its nature is susceptible of being proved by witnesses who can speak from their own knowledge. Choutian v. Searcy, 8 Mo. 733; Allen v. Transit Co., 183 Mo. 411; Wood v. Hicks, 36 Mo. 326; Bates v. Forcht, 89 Mo. 121; Bloom's Son Co. v. Maas, 130 Mo. App.

Digitized by Google

122; Morris v. Parry, 110 Mo. App. 675; Lynch v. Railroad, 208 Mo. 1.

*Lowrence & Casey* and *W. W. Calvin* for respondents.

(1) If the September and April notes were transferred to appellant after their maturity, then appellant was not entitled to a recovery thereon, except for the difference between the amount thereof and the amount of the Purtill & Fine notes, and, this would be true even though appellant knew nothing of the credits to which respondents were entitled thereon. Wheeler v. Barrett, 20 Mo. 573; Mattoon v. McDaniel, 34 Mo. 140; Arnot v. Woodburn, 35 Mo. 99; Cutler v. Cook, 77 Mo. 388; Barnes v. Mullins, 78 Mo. 269; Henley v. Holzer, 19 Mo. App. 245; Gemmell v. Huben, 71 Mo. App. 295, 46 L. R. A. 788n. (2) It was shown that Haas was the authorized agent of the distillers, and that during the course of his transactions and negotiations with the defendants, respondents, he was acting as such agent, and, there being no showing when such agency was terminated, or that defendants, respondents, had any knowledge of such termination, it would be presumed that such agency was existing at the time he made the alleged declaration to defendants, respondents; and such declarations, therefore, as it was shown he made to the defendants, respondents, were properly admissible. McDermott v. Railroad, 73 Mo. 516; Aldridge, Admr. v. E. T. C. Co., 78 Mo. 559; Chillicothe v. Raynard, 80 Mo. 185; Bergerman v. Railroad, 104 Mo. 77; Barker v. Railroad, 126 Mo. 143; Williams v. Williamson, 28 N. C. 281, 45 Am. Dec. 494; Bank v. Navigation Co., 33 Am. Dec. 687. (3) It is conceded that the ground upon which the court granted a new trial was that the verdict and judgment were against the weight of the evidence; and such action by the trial court will not, therefore, be re-



Digitized by Google

viewed upon appeal. Hewitt v. Steele, 118 Mo. 463; Bank v. Wood, 124 Mo. 72; Herndon v. Louis, 175 Mo. 116; Mining Co. v. Webster, 193 Mo. 351.

ELLISON, J.—This action is based on a petition in four counts, each on a promissory note of $160.67. There was a verdict, substantially by agreement, for two of the notes, and also a verdict, after contest, on the other two. Defendants filed a motion for new trial, which was sustained by the trial court on the ground, as counsel for either side agree, that the verdict was against the weight of the evidence; and plaintiff appealed from that order.

It appears that on April 4, 1908, the "Combined Distillers of Kentucky," through their agent Haas, sold to defendants in Kansas City, Mo., ninety barrels of whiskey, for $2249.41, for which sum the latter executed their fourteen promissory notes of $160.67 each.

It was a part of the agreement of the sale that if defendants sold to some other dealer a part of the whiskey, and took notes for the purchase price, such notes were to be made payable direct to the distiller and defendants were to be credited with the amount of them on their notes. Afterwards defendants sold ten barrels of the whiskey to Purtill & Fine, for $307.45, and took their notes payable monthly, for $30.75 each, which they turned over to the Combined Distillery Company as agreed, for credit on their notes, and were informed by the company that the credit had been given. This credit, after allowing for payments defendants made, would pay and discharge the two notes in controversy, unless the following consideration prevents it.

The Distillers Company became insolvent and plaintiff claims to have received the notes from the company as collateral security for loans, in due course, for value, before maturity, without notice of payment or of the arrangement between defendants and the

Digitized by Google

company. That was the sole issue in the trial court. There was evidence in plaintiff's behalf tending to prove its claim that it was an innocent purchaser for value, without notice; and it insists that there was no evidence to the contrary; and that therefore the trial court erred in granting a new trial on the ground that the verdict was against the weight of the evidence.

When a trial court grants a new trial for the reason that the verdict is against the weight of the evidence, and there is any substantial evidence in favor of the party to whom the new trial is granted, that court is within the limit of its discretion and no interference will be made in an appellate court. [Hewitt v. Steele, 118 Mo. 463; First Nat. Bank v. Wood, 124 Mo. 72; Herndon v. Lewis, 175 Mo. 116; Met. L. & Z. Mining Co. v. Webster, 193 Mo. 351; Ordelheide v. Land Co., 208 Mo. 239; Smoot v. Kansas City, 194 Mo. 513; Secrist v. Eubank, 104 Mo. App. 113; Sharp v. Odom, 121 Mo. App. 565.]

We think there was evidence supporting the order of the court under the rule we have just stated. Much of the testimony was introductory—leading down to the main issue and explanatory thereof. First, it was agreed by the Distillers Company that if defendants sold portions of the whiskey on credit the notes for the purchase money could be made payable directly to the company and when received by it, it would credit on defendants' notes and return to defendants such as were in that manner paid, as well as those notes which defendants should pay directly. It was in this way shown that the notes in controversy were paid. Plaintiff then sought to avoid that by showing itself to be a purchaser before the notes were due, and without notice of payment, or of any understanding between defendants and the company. But there were circumstances shown tending to discredit the evidence for plaintiff. One of the two notes in controversy was due the 10th of September, 1908, and the other the

Digitized by Google

10th of April, 1909, and the testimony for plaintiff tended to show that they had been endorsed to it before the former date. But although plaintiff was a banking institution of Cincinnati, which we may rightfully assume to be well acquainted with proper business methods and safeguards, and notwithstanding the payors of the notes lived in a distant state, and notwithstanding the company which endorsed the notes to it was in the hands of a receiver, and therefore worthless to plaintiff, it did not notify defendants that it had anything to do with the notes until near six months after it had purchased them; and then of only *one* note and without saying *when* it became the owner. After notice to defendants they notified plaintiff that the notes had been paid, when, after considerable delay, plaintiff wrote that it was not bound by any arrangement for payment with the Distillers Company.

Again, the other note, due April 10th, was not called to defendants' attention until May 18th thereafter, when it wrote to them that it was that day sending it to a bank in Kansas City for collection; but at this time not saying it had been indorsed to it, or that it was the owner.

There were other circumstances which, taken together, have a tendency to show that plaintiff had not been a *bona fide* indorsee and possessor of these notes for value since before due. We do not state the amount of weight of these additional circumstances, nor of all of them; our duty ends when we say they had some degree of substance worthy of consideration. It should be borne in mind that evidence by word or mouth is not always the best evidence. The most persuasive to belief frequently is that evidence which is made up of circumstances.

The judgment is affirmed. All concur.

Digitized by Google

# JOHN P. MAUPIN, Respondent, v. F. P. MILLER, Appellant.

**Kansas City Court of Appeals, June 3, 1912.**

1. **MASTER AND SERVANT: Grown Man: Warning: Experience: Machinery.** A grown man, in possession of his mental faculties, though inexperienced, is not entitled to a warning from his employer that revolving knives, in clear view in a planing machine, will cut him if he puts his hands too near them.

2. **———: ———: Planing Mill: Revolving Knives: Contributory Negligence.** Where a man fifty year of age, with but a few days' experience in working a planing machine, is engaged in planing lumber by running boards between two rollers whereby they are conveyed to revolving planing knives, on the stopping of one of the boards, goes around to the side of the machine and puts his hand in near the knives to push the board along, and is cut in the hand, he is guilty of contributory negligence which will bar a recovery for the injury.

Appeal from Boone Circuit Court.—*Hon. N. D. Thurmond,* Judge.

REVERSED.

*E. W. Hinton* for appellant.

(1) The plaintiff cannot complain of any failure to warn or instruct him as to the danger of injury from contact with the revolving cutter-head of the machine, because the danger was obvious and he was fully aware of it. Nugent v. Mill Co., 131 Mo. 241; Smith v. Box Co., 193 Mo. 715; Hirsch v. Bread Co., 150 Mo. App. 162; Stegman v. Gerber, 146 Mo. App. 104; Blair v. Heibel, 103 Mo. App. 621; Herbert v. Shoe Co., 90 Mo. App. 315. (2) The plaintiff was guilty of contributory negligence as a matter of law in deliberately putting his hand in the four or five inch space between the pressure bar and revolving cutter-head, where the slightest inadvertent movement would

Digitized by Google

bring it in contact with the knives. Smith v. Box Co., 193 Mo. 715; Doerr v. Brewing Co., 176 Mo. 556; George v. Mfg. Co., 159 Mo. 333; Pohlman v. Car Co., 123 Mo. App. 219; Stegman v. Gerber, 146 Mo. App. 104; Gardner v. Lumber Co., 101 N. W. 700.

*W. H. Rothwell* and *McBaine & Clark* for respondent.

(1) Plaintiff's injury was caused by the failure of defendant to instruct him how to operate a dangerous machine, plaintiff being an ignorant employee, all of which was well known to defendant. 1 Labatt on Master & Servant, ch. 16; Schlavick v. Shoe Co., 157 Mo. App. 83; Czernicke v. Ehrlick, 212 Mo. 386; Dowling v. Allen, 102 Mo. 213; Deeds v. Railroad, 157 Mo. App. 463; Lemser v. Mfg. Co., 70 Mo. App. 209; Werner v. Railroad, 137 Mo. App. 1; Winkstrom v. Mill Co. (Wash.), 93 Pac. 213; Lane v. Atlantic Works, 111 Mass. 136; Marble v. Wooster, 4 Gray (Mass.) 395; Lore v. Mfg. Co., 160 Mo. 608; Jewel v. Mfg. Co., 143 Mo. App. 200; Mather v. Rillston, 156 U. S. 391. Plaintiff was not guilty of contributory negligence. Trent v. Pub. Co., 141 Mo. App. 437; Bradford v. Railroad, 136 Mo. App. 705.

ELLISON, J.—Plaintiff's action is for damages on account of personal injury received while at work in planing some lumber for defendant in one of his machines. Defendant's demurrer to the evidence was refused by the trial court and plaintiff recovered judgment.

Defendant was the owner of a planing mill wherein he operated a planing machine consisting of an iron table, on which were two feed rollers. Just beyond the rollers were revolving knives, but between was a guard which prevented chips from flying back to the operator, and on the other side of the knives there

Digitized by Google

was a space of more than four inches, between the knives and what was called the pressure bar. Standing in front of the machine, the workman or operator places the lumber to be planed in contact with the feed rollers, which carry it forward under the knives. When a plank has been carried through the rollers, it stops, and is pushed on through by one following; or, if no other, by a scrap of lumber fed to the rollers; or, it may be pulled on out from the rear by hand.

Plaintiff was a carpenter, about fifty years of age, but without much experience with a machine of this kind. He had been working in the mill as a janitor and helper for three weeks before his injury. He had worked a little on some of the other machines. Several days before he was hurt, the foreman directed him to plane some lumber, and showed him where to start it into the feed rollers. He did this work and observed the operation of the machine in the rollers carrying the plank to the revolving knives or cutter-head, which planed it as it went through. He testified:

"Q. You saw that was the way it worked when you first worked on it? A. Yes, sir.

"Q. That the two rollers would shove the plank against the knife, and the knife was whizzing around there very fast, wasn't it? A. Yes, sir.

"Q. And it was cutting the plank as the plank passed under it? A. Yes, sir."

Several days after this he was directed to run some window casings through the machine. He had fed in perhaps forty pieces, when the last one, after passing through the rollers, stopped. The foreman was in sight and within four to six feet of him, but without speaking to the foreman, he went around to the side of the machine and put his hand into the space between the revolving knives and the pressure bar, with a view of shoving or starting the planks along, and thus got cut with the knives. He said that he tried to reach over the knives.

Digitized by Google

The negligence charged against the defendant and relied upon for recovery, is that he failed to instruct and warn plaintiff against the danger in the machine. The duty to warn and instruct inexperienced persons against unknown dangers, is a fundamental rule of law. But the rule has no room for operation or application under the evidence in this case. Plaintiff knew the danger from the revolving knives by having worked with them and having observed them. He was a grown-up man and did not need to be told that revolving knives would cut him, any more than that fire would burn him. The thing he did was not such a thing as a warning of danger would have prevented. He would have done as he did, if he had been told that sticking his hand down near fast revolving knives was risky, for he says he already knew that, and still he did it. The only way we can make a case for plaintiff is by changing his age from fifty, back, say, to ten or twelve years. By that means we would have a boy who needs warning against pranks, experiments and recklessness, when employed around dangerous machinery. But a man, although inexperienced in certain work, is not to be excused for acts which he knows are dangerous. He testified that he knew of the knives, of how they worked and what they would do if he put his hand about them, but that he did not think. His words were: "Well, I never gave it a thought." That is to say, he was inexcusably reckless. [Smith v. Forrester-Nace Box Co., 193 Mo. 715; Nugent v. Mill Co., 131 Mo. 241; Hirsch v. Bread Co., 150 Mo. App. 162.]

This case should not be confused with one where unknown results or danger will follow certain acts; or where the effect of certain operation of machinery is unknown; or where it is not properly constructed; or where its complications are such that the uninstructed ought not to be expected to know of the danger.

Digitized by Google

It is said that plaintiff had only one eye. But it is not suggested that he could not see; nor that such defect in any way interfered with his mental activity. If it was a defect tending to make it more hazardous to put his hand into dangerous places, no one could know it better than he, and he must be held to be chargeable with greater care.

We can discover no legal principle which will permit a recovery and hence must reverse the judgment. All concur.

---

## JOSEPH A. HESS, Respondent, v. THE APPLETON MANUFACTURING COMPANY, Appellant.

**Kansas City Court of Appeals, June 3, 1912.**

1. **PLEADING: Contract: Filing Contract.** Where the allegations of the petition contain all of the constitutive elements of a cause for breach of warranty and an essential ingredient of a cause for false and fraudulent representations is missing, the action is for breach of warranty, and the contract, constituting the foundation of the action, or a sworn copy, must be filed with the pleading.

2. **PRACTICE, APPELLATE: Motion for New Trial: Bill of Exceptions.** Where a motion to require the contract, forming the basis of the action, to be filed, is overruled and no further pleading having been filed, judgment is entered and the action of the court in overruling the motion is preserved in a bill of exceptions, a motion for a new trial is not necessary in order to have the cause reviewed in the appellate court.

3. **———: Record Proper.** A ruling on a demurrer or motion that strikes at the sufficiency of the petition, or that challenges the sufficiency of the steps taken to compel the other party to answer or be in default, is a ruling that relates to the record proper, and where such ruling is saved and preserved in a bill of exceptions, it may be taken to the appellate court for review.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas,* Judge.

REVERSED AND REMANDED.

Digitized by Google

*Ellis, Cook & Barnett* for appellant.

(1) A motion for new trial is not necessary to secure the review of the lower court's ruling on a motion such as that in question. Parker v. Waugh, 34 Mo. 343; O'Connor v. Koch, 56 Mo. 258; Sternberg v. Levy, 159 Mo. 624; Butler v. Lawson, 72 Mo. 244; Rigdon v. Furguson, 172 Mo. 52; Aultman & Co. v. Daggs, 50 Mo. App. 288; Bowie v. Kansas City, 51 Mo. 459; Brewing Co. v. Ehlhardt, 139 Mo. App. 133; Johnson v. Latta, 84 Mo. 139.

*H. S. Julian* for respondent.

So all that the court will review on this case is the petition and the judgment, and as they are sufficient the court will not go into the appellant's proposition on the motion to compel plaintiff to file papers, because the trial court should have been given an opportunity to review its errors by the defendant filing motion for a new trial. Taylor v. Brotherhood, 106 Mo. App. 214; Roden v. Helm, 192 Mo. 93; State v. Marshall, 36 Mo. 400; Brady v. Connolly, 52 Mo. 19; Hopper v. Hopper, 84 Mo. App. 117; Kirby v. Railroad, 85 Mo. App. 117; In re Estate of Pound, 91 Mo. App. 424; Donaldson v. Thompson, 120 Mo. 152.

JOHNSON, J.—Plaintiff alleges in his petition that on October 18, 1907, defendant offered to sell him a corn planter, a machine for gathering corn, and "in a written communication to the plaintiff made representations and referred to its guarantee on the back of a printed folder . . . in which the defendant represented and guaranteed by said writing and printing that said machine would pick ears of corn off the stalks whether standing or lying down and deliver the ears into a wagon driven beside the machine and guaranteed to husk clean a large proportion of the ears, etc. . . . and further represented and guaranteed

Digitized by Google

as aforesaid that said machine could be successfully operated with four horses. . . . and upon said representations and guarantee on the part of the defendant the plaintiff did on or about October 28, 1907, agree to purchase said corn picker and paid to the defendant the sum of two hundred and forty dollars for said machine and paid the freight . . . amounting to fifteen dollars." The petition further alleges that the machine would not do the work guaranteed and that plaintiff returned it to defendant paying return freight charges amounting to fifteen dollars. The damages are laid at $270, for which judgment is prayed.

The written guaranty referred to in the petition was not filed by plaintiff and defendant filed a motion that plaintiff be required to file either the original communication or a verified copy thereof. This motion was overruled. An exception to the ruling was saved and defendant elected to stand on the motion and refused to answer or plead to the petition. Thereupon the court heard the evidence of plaintiff and rendered judgment for him in accordance with the prayer of the petition. Defendant appealed.

The principal question for our determination is whether or not the court erred in overruling defendant's motion for a profert of the written instrument on which defendant claims the cause of action alleged in the petition is founded. The language of the petition does not clearly define the nature of the cause asserted by plaintiff. We have not quoted or referred to all of the allegations. The whole pleading leaves us in some doubt about the question of whether plaintiff intended to found his cause on the breach of a warranty or on false and fraudulent representations that induced him to purchase the machine. There is an essential difference between such causes. The first, i. e., an action for a breach of warranty is founded on contract while an action for false and fraudulent repre-

Digitized by Google

sentations is *ex delicto* and, therefore, cannot be said to be founded on contract though the representation be made in writing.

After a careful analysis of the petition we have come to the conclusion that since all of the constitutive elements of a cause for breach of warranty are found in the petition and an essential ingredient of a cause for false and fraudulent representations is missing, plaintiff intended to sue for breach of warranty and to allege a written contract executed by defendant as the foundation of his action. Such interpretation of the petition compels the conclusion that the court erred in overruling the motion for a profert of the written instrument.

Section 1844, Revised Statutes 1909, provides: "When any petition, or other pleading, shall be founded upon any instrument of writing charged to have been executed by the other party, or his testator or intestate, or other person represented by such party, and not therein alleged to be lost or destroyed, the same, or a copy thereof, verified by the affidavit of the party, shall be filed with said petition or other pleading: Provided, that the court may, when good cause is shown, require the production of the original when the same is not filed with such pleading, before the opposite party shall be required to plead."

Since a cause for breach of warranty must be founded on a contract it would appear to be too plain for argument that where the contract is alleged to be "an instrument of writing . . . executed by the other party" the statute requires such instrument or a verified copy thereof to be filed with the petition.

But counsel for plaintiff contend that the ruling on the motion is not before us for review for the reason that defendant filed no motion for a new trial or in arrest. "A motion for a new trial relates only to that which occurs during the trial" (Rigdon v. Ferguson, 172 Mo. l. c. 52), and has no relation to matters

Digitized by Google

pertaining to the record proper. A ruling on a demurrer or motion that strikes at the sufficiency of the petition or that challenges the sufficiency of the steps taken by plaintiff to compel defendant to answer or be in default is a ruling that relates to the record proper and where such ruling is saved and preserved in a bill of exceptions it may be taken to the appellate court for review. [Parker v. Waugh, 34 Mo. l. c. 343; O'Connor v. Koch, 56 Mo. l. c. 258; Sternberg v. Levy, 159 Mo. l. c. 624; Butler v. Lawson, 72 Mo. l. c. 244; Aultman v. Daggs, 139 Mo. App. l. c. 133; Johnson v. Latta, 84 Mo. l. c. 139.]

As is well said by the Supreme Court in O'Connor v. Koch, supra: "But where the whole case is decided upon demurrer to the petition, and judgment rendered thereon, or where the case is dismissed upon motion, and the motion and exceptions are preserved of record by a bill of exceptions, so that the errors of the court appear upon the record, it is not usual or necessary to file a motion for a new trial for the mere purpose of having the court to twice hear the same motion or demurrer. [Bruce v. Vogel, 38 Mo. 100; Parker v. Han. & St. Joe R. R. Co., 44 Mo. 415.]"

The ruling is properly before us. The judgment is reversed and the cause remanded. All concur.

---

## HENRY M. PATTERSON, Respondent, v. AMERICAN INSURANCE COMPANY OF NEWARK, Appellant.

**Kansas City Court of Appeals, June 3, 1912.**

1. **INSURANCE, FIRE: Vacancy Permit: Waiver.** Plaintiff sued on a policy of fire insurance for loss sustained by fire to his farm dwelling. At the time of the fire the house was vacant. The plaintiff, some time prior to the fire, upon hearing that the house was vacant, wrote to the insurance company's agent

Digitized by Google

to issue a vacancy permit, but none was issued. The policy contained a provision that if the premises should become vacant, without the consent of the company's agent, the policy should be void. *Held*, that on receipt of the notice the company was bound to act with reasonable despatch and either issue the requested permit or cancel the policy and return the premium.

2. ———: **Evidence: Forfeiture.** It is error to admit evidence of an oral agreement that a future breach of an insurance contract by the insured will be condoned and not allowed to terminate the policy, as such agreement will not constitute a waiver of a future breach.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield*, Judge.

REVERSED AND REMANDED.

*Fyke & Snider* for appellant.

The property insured was vacant and unoccupied when destroyed, and under the terms of the policy defendant was relieved from any liability on that account. Hoover v. Ins. Co., 93 Mo. App. 111; Cook v. Ins. Co., 70 Mo. 610. It was error to overrule defendant's objection to plaintiff's evidence as to conversations in August, 1906, and the testimony of plaintiff that defendant's agent then stated he would see to, or arrange vacancy permit "in case" the house subsequently became vacant. Rogers v. Ins. Co., 155 Mo. App. 277. There was evidence tending to show exhibit "D" was not received by defendant's agent and the question of notice thereby, should have been submitted to the jury under proper instructions and instruction 3 asked by defendant should have been given. Pennypacker v. Ins. Co., 8 L. R. A. (Iowa) 236; Ins. Co. v. Heath, 69 S. W. 235; Ward v. Trans. Co., 119 Mo. App. 88. There are no elements of vexatious refusal to pay in this case inferable from the facts in evidence or any of the circumstances of the case and no support for the allowance of penalty or attorney's fee herein. Rogers v. Ins. Co., 157 Mo. App. 671; Blackwell v. Ins. Co., 80 Mo. App. 78.

Digitized by Google

*Reed, Yates, Martin & Harvey* for respondent.

JOHNSON, J.—This is a suit on a policy of fire insurance issued February 5, 1905, to H. S. Flanders, on a farm dwelling. In August, 1906, plaintiff became the owner of the property and the assignee of the policy. February 10, 1908, the dwelling was destroyed by fire and defendant refused to pay the loss on the ground that plaintiff had allowed the house to become vacant and to remain so without obtaining a permit from defendant continuing the policy in force. This suit followed.

The petition is in the usual form. The answer pleads the following special defense: "Further answering defendant alleges it is provided in said policy as follows: 'It is agreed that if any of the above mentioned buildings be or become vacant and unoccupied without the consent of the Western Manager of this company endorsed hereon then this policy shall be null and void.' Defendant alleges that after said policy was issued and before the fire the building described in said policy became vacant and unoccupied and said building was so vacant and unoccupied at the time of the fire and had been vacant and unoccupied for a long time prior thereto, all without the consent of the Western Manager of the defendant endorsed on said policy, by reason whereof defendant says said policy became and is null and void."

The reply is a general denial. Plaintiff prevailed in the circuit court where he recovered judgment for the amount of the insurance, the statutory penalty for a vexatious refusal to pay and his attorney's fees assessed at $150. Defendant appealed.

The policy contains the stipulation pleaded in the answer and it is conceded tht the house was vacant about two months before the fire. Plaintiff lived in Oklahoma and had an agent in Independence to look after the farm which is in the vicinity of that city.

Digitized by Google

Plaintiff testified that on January 17, 1908, he received information from his agent that the tenant who had been occupying the house had moved away and that on January 21, 1908, he mailed the following letter to defendant's agent at Independence through whom he had transacted business with defendant:

"I have been informed that my house upon which I hold American insurance policy has become vacant. Please see that the vacancy permit be placed."

Plaintiff does not claim to have received an answer to this letter and defendant's agent denies receiving it. About two weeks after the fire, plaintiff wrote defendant's agent: "Yours of recent date was duly received, replying will state that adverse to your understanding I was not aware that the house in question was vacant until about the time that the fire occurred, this being the case along with circumstances as named in previous letter, I am unable to see where I am at fault."

And under date of February 13, 1908, three days after the fire, plaintiff wrote his own agent at Independence the following letter: "Yours of 10th at hand saying that my house has burned down. Have you gotten any particulars in the case since writing. Now, Mr. Noland I want you to give me the two following points, namely, how long has the house been vacant, and have you had a vacancy permit on, or did you have a vacancy permit on when the house burned. Please write me these questions by return mail—and don't say a word to the insurance agent about this as it may cut a figure in the way of getting my insurance."

In September, 1906, defendant had issued a vacancy permit to plaintiff good for thirty days and this is the only permit that was issued. By the terms it expired more than a year before the fire.

On direct examination plaintiff was permitted to testify as follows: "Q. I will ask you to tell the jury, Mr. Patterson, what conversation, if any, you

Digitized by Google

ever had with any agent of the American Insurance Company at any time with reference to the vacancy of the property. A. It was just before leaving for Oklahoma on my second trip to Independence when I first went to Independence to have the policy transferred from Flanders to myself, September, 1907. The conversation was either with Mr. Rider or a representative in his office. The man who made the transfer of the property from Flanders to myself.

"Q. Tell the jury what the conversation was?

"Objected to for the reason that it is immaterial, and for the reason that it appears now that the vacancy of which complaint is made did not occur until January following, and it is apparent that this was long before the subject of any such conversation could have become active. Overruled and excepted to.

"A. I told the agent that I was going away to Oklahoma and that I want he should look after the house, and if it should become vacant at any time to see that a permit should be put on, and that was the understanding between me and him before leaving.

"Defendant further objected to such statement and asked that the same be stricken out for the reason that it was impossible to have made such a condition to become active on the occurrence of an uncertain event which it was not then known would ever take place, and contrary to the written terms and conditions of the policy then in the possession of the plaintiff in this case. Objection overruled.

"By the Court: Just state what was said. To which ruling and order of the court defendant at the time excepted.

"Just state what the agent said to you. A. Well, the substance of what he said was, that he would see to the permit in case the house became vacant.

"To which statement defendant further objected for the reason that it occurred long previous to the



Digitized by Google

happening of the event in mind and at a time when it was not known the property would become vacant. Objection overruled and excepted to."

These alleged conversations were denied by defendant's agent.

The court overruled defendant's request for a peremptory instruction in the nature of a demurrer to the evidence and gave certain instructions to the jury requested by plaintiff which are not in the record, for the reason that they were lost after the trial and could not be reproduced. Defendant's refused instructions are in the record but on account of the absence of plaintiff's instructions we cannot consider the rulings of the trial judge on them. As it said by the Supreme Court in Birney v. Sharp, 78 Mo. l. c. 76: "On the first point, it is manifestly impossible, in the absence of the instructions given for the plaintiff, for the court to determine whether they were right or wrong. In such cases all the presumptions are in favor of the correctness of the ruling of the trial court. In their absence and without knowing what points have been ruled and how, it is equally impossible to determine whether it was error in the court to refuse the instructions asked by defendant. They may, from aught that appears, have covered the same ground, and been embraced in those already given for the plaintiff, and refused for that reason. Without the entire record before us, we cannot say that the court erred in this particular. In such cases, also, the presumptions are in favor of the propriety of the action of the lower court."

Our inquiry, therefore, will be restricted to the question of the correctness of the court's ruling in refusing defendant's request for a peremptory instruction and of the further question of the admissibility of the testimony of plaintiff relating to the alleged oral agreement of defendant's agent to grant a vacancy permit whenever one would be needed. The stipula-

Digitized by Google

tion providing that the policy should become null and void if the house became vacant or unoccupied during the term of the insurance was one the parties lawfully could make and we must give it full force and effect unless it appears that it was abrogated by the subsequent oral agreement plaintiff claims he had with defendant's agent, or that it was waived by defendant. [Hoover v. Ins. Co., 93 Mo. App. 111, and cases cited.] The oral agreement which plaintiff says was to the effect that defendant would grant a vacancy permit whenever a future vacancy might occur, cannot be enforced on the ground that it constituted a new contract abrogative of the stipulation in the policy in question, for the reason that it is unsupported by a new consideration. Parties who make a contract have the power to modify it by a subsequent agreement, but there must be a sufficient consideration for the modification to give it contractual force.

Since the oral agreement cannot be considered as a contract, may it be regarded as pertinent to the issue of waiver?

The stipulation provided a ground of forfeiture and defendant's contention is that the vacancy of the property *ipso facto* worked a forfeiture since the written consent of defendant to continue the insurance during the vacancy was not obtained.

There can be no waiver of a forfeiture until the ground of forfeiture has occurred, and for the reasons stated by us in the opinion in the recent case of Rogers v. Ins. Co., 155 Mo. App. 276, the agreement of the agent of the insurer, that a future breach by the insured of one of the stipulations of the policy will be condoned and not allowed to terminate the insurance, will not constitute a waiver of such future breach. The fact that the promise was made at the time of the issuance of a temporary permit for a vacancy that afterwards was terminated could have no relation to a future vacancy—a future breach of the contract. It

Digitized by Google

is a logical and legal solecism to speak of a noncontract waiver occurring before the breach has occurred.

These considerations impel us to hold that the court erred in admitting evidence of the oral agreement, since such evidence had no bearing on any issue of the case.

But we think the refusal of the peremptory instruction asked by defendant was proper. Plaintiff's evidence tends to show that some three weeks before the fire he notified defendant's agent by letter that the house was vacant and requested a permit. This evidence is strongly contradicted by other evidence, but it is substantial and for the purposes of a demurrer to the evidence, must be accepted as true. On receipt of the notice, defendant was bound to act with reasonable dispatch and either issue the requested permit or cancel the policy and return the unearned premium. As is said in Pelkington v. Ins. Co., 55 Mo. 177, "it is the duty of the company, if it does not intend to be further bound or to continue the risk, to express its dissent, and not allow the party to repose in fancied security to be victimized in case of loss. It is unconscientious to retain the premium and affirm the validity of the contract whilst no risk is imminent, but the very moment that a loss occurs, to then repudiate all liability and claim a forfeiture." [See, also, Polk v. Ins. Co., 114 Mo. App. l. c. 518.] Plaintiff's evidence affords a reasonable inference that defendant did not act on the notice in accordance with the mandate of this rule and in so failing to act waived the forfeiture.

For the error noted the judgment is reversed and the cause remanded. All concur.

Digitized by Google

# E. J. MOORE, Respondent, v. THE WESTERN UNION TELEGRAPH COMPANY, Appellant.

**Kansas City Court of Appeals, June 3, 1912.**

**TELEGRAPH AND TELEPHONE: Delivery of Messages.** The statute, Sec. 3330, R. S. 1909, requiring a telegraph company to use reasonable diligence to transmit and promptly deliver messages does not make the company an insurer of the delivery of messages, or that it must employ extraordinary care and diligence to find the addressees, but that it must act with reasonable care and promptness.

Appeal from Boone Circuit Court.—*Hon. N. D. Thurmond,* Judge.

REVERSED.

*Geo. H. Fearons, N. T. Gentry* and *Fred S. Hudson* for appellant.

(1) This suit is based on Sec. 3330, R. S. 1909, and is a penalty statute. Such statutes are considered by the courts of this state as harsh and must be strictly construed. The statutes shall apply to such cases only as come fully and clearly within the provisions. Nothing must be taken by intendment. Cowan v. Telegraph Co., 149 Mo. App. 407; Edrington v. Telegraph Co., 115 Mo. App. 98; Rixke v. Telegraph Co., 96 Mo. App. 410; Grant v. Telegraph Co., 154 Mo. App. 279. (2) The telegraph company is not an insurer of the de livery of messages filed for transmission, and it was bound to do no more than it was paid to do, i. e., transmit the message to the designated office and then make reasonable effort to deliver it. Reynolds v. Tel egraph Co., 81 Mo. App. 227; Telegraph Co. v. Trotter, 55 Ill. App. 659. (3) Where it is shown to be the custom, as in this case, of the hotel clerk to receive and receipt for messages for persons who are guests, reg-

Digitized by Google

istered at the hotel, a delivery to the clerk of the hotel is a proper delivery. Telegraph Co. v. Cobb, 67 S. W. 87; Telegraph Co. v. Reddinger, 63 S. W. 156; Telegraph Co. v. Reddinger, 65 S. W. 78; Telegraph Co. v. Reddinger, 66 S. W. 485; Telegraph Co. v. Mitchell, 66 Am. St. Rep. 911.

*Harris & Finley* for respondent.

(1) Although a penal statute should be strictly construed, the construction thereof should be reasonable. Dudley v. Telegraph Co., 54 Mo. App. 391; Pike v. Jenkins, 12 N. H. 255; United States v. Winn, Fed. Case No. 16740. (2) A telegraph company is the agent of the sender of a message, and his right to the penalty prescribed for a failure to perform the duty imposed by section 3330, Revised Statutes 1909, cannot be affected by any act of the addressee. Brashears v. Telegraph Co., 45 Mo. App. 433; Thompson v. Telegraph Co., 10 Tex. Civ. App. 120. (3) The duty which a telegraph company owes is to make a delivery to the addressee in person, and is not fulfilled until due diligence has been exercised to place it in his hands. Telegraph Co. v. Whitson, 45 Ala. 426; Glover v. Telegraph Co., 59 S. E. 526; section 3330, supra. (4) What constitutes "due diligence," or "reasonable care," which are practically synonymous, is a question for the trier of the facts. Bradshaw v. Telegraph Co., 150 Mo. App. 720; Hendricks v. Telegraph Company, 126 N. C. 304, 35 S. E. 543. (5) A custom to be good must be general, certain, and notorious; and, to be binding on parties to a transaction, must be directly known to them, or so universal and general in its character that knowledge may well be presumed. Fruit and Cotton Press Co. v. Stanard, 44 Mo. 71; Martin v. Hall, 26 Mo. 386.

JOHNSON, J.—This is an action to recover the penalty prescribed in section 3330, Revised Statutes

Digitized by Google

1909, for the failure of a telegraph company promptly to transmit and deliver a telegram. A jury was waived and after hearing the evidence the court rendered judgment for plaintiff. Defendant appealed.

Plaintiff delivered a message to defendant telegraph company at one of its offices in St. Louis for transmission to Columbia, Missouri, and paid the charge demanded by defendant's agent. The telegram was addressed to Charles M. Hay, a lawyer residing at Fulton who was temporarily in Columbia attending a session of the circuit court. Mr. Hay frequently visited Columbia on professional business and on such occasions generally stopped at the Athens Hotel, one of the principal hotels for transient guests. At the time in question he had been a guest of the hotel two or three days and had been engaged in the trial of a case in the circuit court. He had left no special instructions at the hotel office relative to mail or telegrams but had received mail there. It was the custom of the management to receive mail and telegrams addressed to guests and if an addressee was not in the hotel at the time and his whereabouts were unknown, to put the letter or telegram in the key box corresponding in number to his room.

The message in controversy was received at defendant's office in Columbia about three o'clock in the afternoon and one of defendant's messengers was sent out to deliver it. He went to the hotel, was informed by the clerk that the addressee was a guest of the hotel and occupied a room but was at the courthouse. The messenger at once went to the courthouse, found the clerk of the circuit court and learned that court was not in session and that Mr. Hay was not in the courtroom. He then returned to the hotel and delivered the message to the clerk who receipted for it and put it in Mr. Hay's key box in the office. Late in the afternoon Mr. Hay came to the hotel office, paid his bill and departed for home. He did not notice the mes-

Digitized by Google

sage in his box, did not think to inquire for letters or telegrams, and the clerk in charge of the office forgot about the message and did not think of it until the following morning. Then he delivered the contents of the message over the telephone to Mr. Hay at Fulton.

It appears that when the messenger visited the courtroom court had not adjourned for the day but had taken a short recess to enable the attorneys in the case on trial, among them Mr. Hay, to prepare their instructions to the jury. Mr. Hay had gone to the office of the local attorneys who were associated with him and was there at work on the instructions. That office and defendant's office were in the same block. The messenger did not think to ask the clerk whether or not court had adjourned nor did the clerk tell him that it was only a short recess. The messenger testified on cross-examination:

"Q. Did you ask if he would be back that evening? A. I do not know whether I asked or not. We always generally ask them whether or not they will be back.

"By the Court: Do you remember what you asked the clerk at that time? A. I asked the clerk was Mr. Hay stopping there.

"Q. What else did you ask him? A. I don't remember any other words."

The clerk testified: "He (the messenger) came to my office down stairs and told me that he had a message for him and I came up to the courtroom and saw that the court was not in session and Mr. Hay was not in the courtroom and I went back and reported the fact to him. He asked me where he would be likely to find him and I told him the Athens Hotel. . . .

"Q. He came back and the case was argued after supper? A. Yes, sir, before supper and was finished up after supper.

Digitized by Google

"Q. Did this messenger boy ask you how long it would be before Mr. Hay would be back? A. No, sir.

"Q. Or make any other inquires—after you told him that he could probably be found at the hotel, he asked you no other questions? A. No, sir."

The clerk of the hotel on direct examination testified: "I think he brought it in between three and four, if I am not mistaken; I told him Mr. Hay was not in the office, he was at the courthouse. He said he didn't have time to bring it. I signed for the telegram and put it in Mr. Hay's box."

On cross-examination: "Q. And what did you say to him? A. I told him he was at the courthouse.

"Q. About what time was that in the day? A. I think in the afternoon, between three and four—something like that.

"Q. This hotel where you—you say it was the Athens Hotel in this city? A. Yes, sir.

"Q. It has a public office there? A. Yes, sir.

"Q. In charge of a clerk, at all times? A. Yes, sir.

"Q. Has Mr. Hay been a regular guest at the hotel? A. He has stopped there frequently.

"Q. Do you remember how long he had been there at this particular time? A. No, sir, I do not.

"Q. It had been several days? A. Well, I could not answer that.

"Q. He had a room? A. Yes, sir.

"Q. And this room was supplied with a key? A. Yes, sir.

"Q. That was kept in a regular place for that purpose? A. Yes, sir, a key box.

"Q. Did you ever deliver any mail to Mr. Hay at any time? A. I think I have, but I don't remember that he got any at this time.

"Q. That is the way you do? A. Yes, sir, we put the mail in the key box.

Digitized by Google

"Q. At the hotel, where you kept the key? A. Yes, sir.

"Q. Now, I will ask you if this key box that you have reference to is used for the purpose of leaving mail and telegrams and things of that sort? . . . A. It is.

"Q. And that is what you do with it? A. Any mail that comes to one that stops in the house we put it in the key box.

"Q. And telegrams likewise? A. Yes, sir.

"And do you receipt for telegrams for guests that are registered at your hotel? A. Yes, sir, I did do it.

"Q. Well, was that your custom, to do that—how long have you been in the hotel business? A. About fifteen years.

"Q. I will ask you whether or not it has been your custom during those fifteen years? . . . A. It is my custom and I have always done it.

"Q. Here in Columbia? A. Yes, sir.

"Q. During your experience as a hotel man? A. Yes, sir, fifteen years in different hotels here."

The view of the law of the case expressed in the declarations of law given by the court is that it was the duty of defendant to exercise reasonable care and diligence to deliver the telegram into the hand of the addressee and in rendering judgment for plaintiff the court found as a fact that defendant's messenger had been negligent in his attempted performance of this duty. This finding has the force of a verdict of a jury, this being a law case, and if it has substantial support in the evidence we cannot set it aside, though we should believe it is opposed to the weight of the evidence.

The only error claimed by counsel for defendant is that of the court in refusing to declare as a matter of law that defendant had used reasonable care and diligence in the delivery of the telegram. The position of counsel for plaintiff is that the issue of whether or

Digitized by Google

not such care has been observed is shown by the evidence to be one of fact and not of law. Section 1255, Revised Statutes 1899 provided:

"It shall be the duty of every telegraph . . . company . . . on payment or tender of the usual charge for transmitting dispatches . . . to transmit the same promptly and with impartiality and good faith under a penalty of two hundred dollars for every neglect or refusal so to do," etc.

In Connell v. Telegraph Co., 108 Mo. 459, the Supreme Court construing this statute held in an action to enforce the penalty on account of neglect in the delivery of a message sent from this state to a point in another state that the term "to transmit" did not include delivery to the addressee and that the demurrer to the petition should have been sustained. In 1907 the Legislature amended the statute to read as follows:

"It shall be the duty of every telegraph . . . company . . . to transmit and deliver the same (a dispatch) to designated address and to use due diligence to place said dispatch in the hands of the addressee by the most direct means available . . . promptly and with impartiality and good faith under a penalty of three hundred dollars for every neglect or refusal so to transmit and deliver." [Sec. 3330, R. S. 1909.]

Being highly penal in that it authorizes a recovery by the sender of a telegram of the full penalty without proof that the neglect to deliver caused any actual damage or pecuniary loss to the sender, the statute is to be strictly construed. [Connell v. Telegraph Co., supra; Eddington v. Telegraph Co., 115 Mo. App. l. c. 98; Grant v. Telegraph Co., 154 Mo. App. 279.] But by the expression "strict construction" is meant that the scope of the statute shall not be extended by implication beyond the literal meaning of the terms employed and not that the language of the terms

Digitized by Google

shall be unreasonably interpreted. Courts should neither enlarge nor narrow the true meaning of penal statutes by construction but should give effect to the plain meaning of words and where they are doubtful, should adopt the sense in harmony with the context and the obvious policy and object of the enactment.

The plain letter of the statute as amended discloses the legislative purpose of requiring a telegraph company to use reasonable diligence not only in the transmission of a paid message over its wires but in the prompt delivery of such message into the hand of the addressee by the most direct means available. This does not mean that the company is an insurer of the delivery of the message or that it must employ extraordinary care and diligence to find the addressee and personally hand him the message but that it must act with reasonable care and promptness, such care as the hypothetical ordinarily careful and prudent man would employ in the performance of a duty emphasized by a penal law. We agree with the view of plaintiff that since the statute bestows the cause of action on the sender of the message and not on the addressee the latter would have no authority to waive the performance of the duty imposed on the company, but we do not sanction the suggestion that either the sender or the company who is his agent has any right to invade the privacy of the addressee against his will and to force into his hands a message he refuses to receive. Nor did the Legislature intend that every telegraph office should carry a detective bureau as an adjunct to ferret out an addressee who could not be found by an ordinary messenger pursuing ordinary methods with reasonable care and diligence. The messenger went to the hotel where the addressee was a guest and had a room; learned that he was a lawyer, a stranger in the city and that likely he was at the courthouse. He went to the courthouse and make inquiries of the clerk of the circuit court. The clerk

Digitized by Google

says he went to the courtroom, saw that court was not in session and that Mr. Hay had gone and then returned to his office and informed the messenger of these facts and directed him to take the message to the hotel. The clerk knew the messenger had a telegram for Mr. Hay but did not tell him that the court had taken only a short recess and that Mr. Hay would return. What he did say would have caused any reasonable person in the situation of the messenger to believe that court had adjourned and that Mr. Hay would not return.

No doubt an experienced detective would have cross-examined the clerk and elicited information that would have led him to the lawyers' office, but we think plaintiff in asserting that the messenger should not have acted on the information given him by the clerk, is exacting not ordinary but extraordinary care of an ordinary telegraph messenger who, if he possessed experience in affairs and acute faculties of such high order should be in some more lucrative employment. We say that the evidence of plaintiff does not tend to show any neglect of duty on the part of the messenger in returning to the hotel as directed. On finding that the addressee had not returned to the hotel did he not use "the most direct means available" for putting the message into the hands of the addressee? Believing that court had adjourned he had every reason to believe that Mr. Hay would return to his hotel in a short time and that by leaving the message there he would accomplish a delivery more quickly than by going about a city of eight or ten thousand inhabitants making inquiries of the whereabouts of a stranger who had no other known places of resort than the hotel and the courthouse. It does not seem important to discuss whether or not the hotel management was the technical agent of its guests in such matters. The statute required defendant to use the most direct means available and we say as a matter of law that it

Digitized by Google

did use such means. It is a matter of common knowledge that transient guests of hotels receive mail and telegrams at their hotels. Defendant in good faith could act on that knowledge having available no more direct means of finding the addressee. The failure of the message to come into the hand of Mr. Hay promptly was due partly to his own negligence and partly to the negligence of the hotel clerk who, having received the message, forgot to deliver it at the first opportunity. If Mr. Hay had only looked at his key box when he paid his bill—and it was in plain sight—he would have seen the message. To hold defendant liable in this case would be to make it responsible for the faults of others after it had done what any ordinarily reasonable and prudent person would have done in the same situation.

The judgment is reversed. All concur.

---

## A. P. FORD, Respondent, v. HARRY C. McCLAIN, Administrator, Appellant.

**Kansas City Court of Appeals, June 3, 1912.**

1. **SURETY: Consideration: Signing Afterwards.** Where a surety signs a note that has been already executed and delivered and is a past transaction, without any new consideration, it is without consideration as to him. But if at the time the note is given, it is a part of the contract out of which the note arose that the surety will be procured to sign, and he does so, no new consideration is necessary and he is bound.

2. ———: ———: ———: ———: **Witnesses: Competency.** A vendor and vendee in consummating the sale of a mine wherein the vendee, who executed and delivered a note for part of the purchase money, agreed with the vendor, as part of the contract, that he would get a surety, not present, to afterwards sign the note, and the surety afterwards did sign it, and then died; it was *held*, that the vendor and vendee, as well as their agents, were competent witnesses in an action brought on the note against the estate, and that their disqualification was not contemplated by the statute on witnesses.

Digitized by Google

3. ———: ———: ———: **Other Parties: Independent Transactions.** The surviving party to a contract in suit, or his agent, is not disqualified in all instances in actions against the deceased's estate. They may testify to transactions had with others to which the deceased was not a party, and with which he had no connection and of which he had no knowledge.

Appeal from Jackson Circuit Court.—*Hon. J. E. Goodrich,* Judge.

AFFIRMED.

*W. R. Thurmond* and *Fyke & Snider* for appellant.

(1) The court erred in holding that deceased was liable upon the note. It is undisputed that the note was executed by Bruner and Hedrick and delivered to Ford, and the whole transaction closed before the note in controversy was ever signed by McClain, if it was signed by him at all, and there is a total absence of any competent testimony to show if said note was signed by McClain that there was ever any previous agreement on the part of McClain to sign the same, or that the signing thereof by him was any part of the original consideration moving to Ford for the execution of the bill of sale to the mining property, hence even if McClain signed the note it is without consideration and imposes no liability upon him. McMahan v. Geiger, 73 Mo. 145; McFarland v. Heim, 127 Mo. 327; Higgins v. Harvester Co., 181 Mo. 300; Lowenstein v. Sorge, 75 Mo. App. 219; Adams v. Huggins, 78 Mo. App. 219. (2) The evidence clearly shows that if McClain signed the note it was signed without the knowledge of either Bruner or Hedrick; such being the case the addition of the signature of McClain to the note was an alteration thereof and released both Bruner and Hedrick, or such of said parties as had no knowledge of the execution of the note by McClain if he did

Digitized by Google

execute it. Gardner v. Gibbons, 91 Mo. App. 412. (3) The court erred in permitting the plaintiff, Ford, and the witnesses, Scott and Tedford, to testify against the estate of the deceased to anything that transpired before the administrator was appointed. Ford was a party to the suit and the testimony shows that both Scott and Tedford were directly interested in the result of the suit and were agents of Ford. Biehrs, Admr., v. Brockman, 70 Mo. App. 503; Curd v. Brown, 142 Mo. 82; Edwards v. Warner, 84 Mo. App. 200; Newspaper Co. v. Jung, 81 Mo. 577; Kersley v. O'Day, 173 Mo. 560; Green v. Ditsch, 143 Mo. 1; Brewing Co. v. Rahling & Manke, 133 Mo. App. 65; Lesch v. McFadden, 110 Mo. 584.

*J. W. McAntire* and *Dudley W. Eaton* for respondent.

There can be no principle of law invoked by the defendant in this case by which he could avail himself of right to have any credit whatever upon the note at bar, by reason of the fact that Bruner had successfully, in his suit, obtained a reduction upon the two notes signed by himself and Hedrick and not signed by Carey McClain. In other words, it appears to us that whatever reduction Bruner and Hedrick were entitled to upon the two five thousand dollar notes, they obtained in that suit. It was for their benefit and not for Carey McClain. The judgment rendered in the Waite case was a finality only for such of the claims and defenses as were actually litigated in the suit in Jasper county. Black on Judgments, sec. 751; Crowell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; O'Connor v. Carney, 10 Gray (Mass.) 231; Latta v. Visel, 37 Neb. 612, 56 N. W. 311; Read v. Cross, 48 Pac. 491. The statute does not exclude the living party from testifying where his evidence relates to transactions and conversations had with others to which the deceased

Digitized by Google

was not a party and with which he had no connection. Kirton v. Bull, 168 Mo. 622; Nugent v. Curran, 77 Mo. 323; Eyermann v. Piron, 151 Mo. 107; Banking House v. Rood, 132 Mo. 256; Orr v. Rode, 101 Mo. 387; Wade v. Hardy, 75 Mo. 394.

ELLISON, J.—This controversy involves the liability of defendant's intestate on a promissory note executed to plaintiff for $3500, dated February 25, 1903, and signed by R. E. Bruner, C. L. V. Hedrick and Carey McClain. The case was tried by the court without the aid of a jury and judgment rendered for plaintiff.

It appears that plaintiff sold to Bruner and Hedrick a zinc mine in Jasper county for $30,000. Of this amount $15,000 was paid in cash, $1500 in stock in a corporation, two notes of $5000 each, and one for $3500—the latter being the one in controversy. When the parties met in Joplin, Mo., to consummate the sale, a question came up about security for the deferred payments and a heated dispute arose on that proposition. Finally it was agreed, and a writing to that effect signed, that if Bruner and Hedrick should sell the mine before either of the notes became due, all of them remaining unpaid should immediately become due. In other words, a sale of the property of Bruner and Hedrick would have the effect of maturing all the notes.

So far there is no dispute. But plaintiff insists that it was, in addition, likewise agreed that the deceased, a relative of Bruner's, not present, and residing in Kansas City, should afterwards sign the note in controversy. Defendant denies that agreement and insists that if deceased signed the note, it was after the transaction was closed, and was without consideration; insisting on the legal proposition that where a surety signs an obligation arising out of a transaction



Digitized by Google

closed and completed before he signed, there must be some new consideration to support it. The latter proposition is correct. But if at the time the deal is consummated it is agreed that a note for a deferred payment is to be signed by another party, and in compliance therewith the vendee secures the signature of the other party, there is ample consideration therefor, since it is merely carrying out and giving effect to one item of the final contract of sale. [Montgomery County v. Auchley, 92 Mo. 126; Adams v. Huggins, 73 Mo. App. 140, s. c., 78 Mo. App. 219; Hill v. Coombs, 92 Mo. App. 242, s. c., 93 Mo. App. 264.]

The controversy, in the main, is one of fact. The proof was ample that deceased signed the note, and the question is, was there evidence at the trial tending to show that such was the understanding at the time the purchase of the mine was completed. We think there was. But defendant challenges the competency of the witnesses who testified to this, on the ground of McClain being dead; relying upon the statute disqualifying one party to a contract where the other party is dead (Sec. 6374, R. S. 1909). These witnesses were Scott and Tedford, whom defendant claims were interested in the way of commissions and were agents for plaintiff.

We do not think the statute applies to the peculiar facts of this case. Here was a contract made between other parties than deceased and in which he had no part. All of the parties to that contract were alive and were witnesses at the trial. The contract there made was that Bruner and Hedrick, the purchasers of the mine, would get deceased, who, as we have said, was not present, to sign the note. It was a contract collateral to the one in suit, supporting its validity by showing a consideration. But not a consideration of advantage moving to deceased, or in which he was concerned; but it was that other sort of consideration whereby there was disadvantage to, or a parting

Digitized by Google

with some value by, the other party. Suppose that upon agreement A sells and delivers his horse to B for $100, B giving his note to A with the understanding it will be signed by C (who knows nothing of the matter) on A presenting it to him. C is not a party to that contract and knows nothing of it, and, if alive, could not testify to anything which had transpired, because he knew nothing of it. It seems clear that if C should sign the note and die, the parties to that contract would not be disqualified by the statute.

Though deceased was not a party to that contract, it is said he is a party to this cause of action, and therefore the other party is disqualified by the statute. We think not. The statute does not disqualify the living party from testifying concerning "transactions had with others and to which the deceased party was no party and with which he had no connection, and of which he had no knowledge." [Martin v. Jones, 59 Mo. 181, 187; Eyermann v. Piron, 151 Mo. 107.] The issue whether an agreement was made at the time the sale was closed that deceased was thereafter to be got to sign the note, was an issue exclusively between living parties. [Nugent v. Curran, 77 Mo. 323, 325.]

The witness Scott was allowed to make the statement that deceased told him at some time prior to the consummation of the sale that he would help Bruner and Hedrick to buy the mine. Conceding that this statement of the witness as to what deceased himself had said was incompetent, we think it clearly was harmless. To have any bearing on the case it must have referred to signing the note, and that fact is only feebly denied. It was proved beyond question, by competent testimony, that he did sign it, and it would be trifling with justice to reverse the judgment for allowing that statement to be made.

What we have written disposes of the points properly in the case. We will, however, remark, in answer

Digitized by Google

to suggestions about attempts to bind deceased by contracts made in his absence and to which we was not a party, that no object of that kind appears. The evidence as to the agreement to get deceased to sign the note, was merely to establish the entire contract of sale of the mine as it was finally closed, which included that deceased was to sign the note. The only evidence binding an obligation upon deceased was that afterwards he *did* sign it.

The judgment is affirmed. All concur.

---

## M. F. ZWICKY, Respondent, v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant.

**Kansas City Court of Appeals, June 3, 1912.**

1. **NEGLIGENCE: New Highway: Maintenance of Sidewalks.** Where a new highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but all structures necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way.

2. **———: Duty to Maintain Structure: Question for Jury.** It is held in this case that it was the duty of the defendant to maintain the sidewalk in a reasonably safe condition for pedestrians, and whether it was so maintained without a railing was a question for the jury under the evidence.

3. **———: Usual Way: Chosing Dangerous Route.** A pedestrian is not bound to depart from the usual way of travel, notwithstanding it may be defective and dangerous, unless the danger is so great that a person of ordinary prudence, in the exercise of ordinary care, would avoid it by choosing some other and safer route.

Appeal from Carroll Circuit Court.—*Hon. Francis H. Trimble,* Judge.

AFFIRMED.

*Thomas R. Morrow, James P. Gilmore, John H. Lathrop* and *Jones & Conkling* for appellant.

Digitized by Google

(1) The walk as it existed was reasonably safe, as a matter of law. (2) The plaintiff was guilty of contributory negligence in this case. Diamond v. Kansas City, 120 Mo. App. 185; Rogers v. Bloomington, 52 N. E. 242; Payne v. Railroad, 136 Mo. 562; Spiro v. Transit Co., 102 Mo. App. 250; Hook v. Railroad, 162 Mo. 569; State v. Fannon, 158 Mo. 149; Nugent v. Milling Co., 131 Mo. 241; Bloomington v. Rogers, 36 N. E. 439; Centralia v. Krause, 64 Ill. 19; Wright v. St. Cloud, 55 N. W. 819; Wilson v. Charleston, 8 Allen 137; Erie v. Magill, 101 Pa. 616; Schaefler v. Sandusky, 33 Oh. St. 246; Bohl v. Dell Rapids, 15 S. D. 619; Columbus v. Griggs, 113 Ga. 597. (3) The railway company as defendant in this case cannot be liable in any event. Blackwell v. Hill, 76 Mo. App. 56; Baustian v. Young, 152 Mo. 317; St. Louis v. Ins. Co., 107 Mo. 92. (4) The court erred in the giving of plaintiff's instructions 1, 2 and 4, and in refusing to give defendant's instruction 5. Gallagher v. Tipton, 133 Mo. App. 557; Diamond v. Kansas City, 120 Mo. App. 185.

*Guy Whiteman, Lozier & Morris* and *Frank E. Atwood* for respondent.

(1) The court was right in not declaring that the walk as it existed was reasonably safe, as a matter of law. Buesching v. Gas Light Co., 73 Mo. 229; Fischer v. St. Louis, 189 Mo. 576. (2) Plaintiff was not guilty of contributory negligence. Barton v. Railroad, 52 Mo. 257; Smith v. St. Joseph, 45 Mo. 452; Flynn v. Neosho, 114 Mo. 572; Graney v. St. Louis, 141 Mo. 184; Swails v. Caruthersville, 138 S. W. 593; Buesching v. Gas Light Co., 73 Mo. 232; Ashby v. Gravel Road Co., 99 Mo. App. 186.

BROADDUS, P. J.—This is an action for damages for personal injuries sustained by plaintiff by reason of a fall from a sidewalk in Hardin, an incor-

Digitized by Google

porated town in this state. The sidewalk is situated near the business part of the town and along on the west side of First street, extending from the south line of defendant's right of way to its tracks. On the north is the defendant's station depot. It was the main traveled walk from the business part of the town to the depot.

The defendant in constructing its railroad erected an embankment across First street which left a depression on the west side of the street, and on the south side of the embankment. The defendant constructed a sidewalk across this depression from the south line of its right of way running north to its tracks and depot. This walk was about thirty feet long, about four feet wide, and part of the way was elevated above the ground, and at the place where plaintiff fell was so elevated about two and one-half feet. The town of Hardin had nothing to do in constructing or maintaining said side walk. But it was constructed and kept solely in repair by defendant.

The plaintiff was a cobbler by trade and sixty-eight years of age. He lived with his employer, whose house was on the west side of First street, north of the railroad tracks. The shop at which he worked was on the south side of said tracks, and the plaintiff in going to and from his work passed over the walk in question several times a day for four months, and was fully familiar with its condition. There is no complaint that the walk was out of repair, but the allegation of negligence is, that defendant failed to furnish it with side railings for the safety of pedestrians.

Plaintiff's injury occurred in the night. He had been to the shop after supper and in returning to his home and in passing over this sidewalk he slipped off, fell and was injured.

The plaintiff's evidence was to the effect that the night was very dark; that he knew that it was dangerous to attempt to cross the sidewalk, but that he used

Digitized by Google

the precaution of feeling with his feet as he went along, but suddenly he stepped off and fell to the ground, which at that point was thirty inches below the sidewalk; that he had his hands in his pockets, was walking along leisurely thinking about getting home. On cross-examination he stated that he was not thinking about anything except getting home; and that he was going in an ordinary walk. He was asked: "You were walking along with your hands in your pocket and thinking about getting home and going to bed? A. Yes. Q. That was all you were thinking about at that time? A. Yes, sir." In his deposition, taken previously, he was asked: "What were you thinking of doing as you walked down there? A. God knows what I was thinking about, I was thinking about going home and getting to bed, I guess."

The finding and judgment were for the plaintiff and defendant appealed. The appellant, in its original brief, made several assignments of error, but in its reply brief it waives all errors except the question of negligence, and is willing to "have the entire matter determined on the questions of the negligence of appellant and negligence of the respondent causing or contributing to the injuries." That is to say, that the appellant's contentions are, First: That there was no liability on the defendant company for failure to keep the sidewalk safe and in repair. Second: That plaintiff's evidence "shows conclusively that he was walking along as he ordinarily did in the day time when he could see, which shows that he was not feeling with his feet at all, or that he was not doing so at the time, or in the manner required of persons groping in the dark."

To sustain appellant's first proposition we are cited to certain cases which do not apply. The law is otherwise, and is stated by this court in an opinion by ELLISON, J., that one who maintains a public place and constructs walks on his grounds for the approach of the

Digitized by Google

public is liable to parties for injuries sustained on his defective sidewalk. [Evans v. Railroad, 130 Mo. App. 509.] And it was held in another case by the same learned judge that: "It is a well-settled rule of the common law, resting upon the most obvious considerations of fairness and justice, that where a new highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way." [Independence v. Railway, 86 Mo. App. 585.] We feel constrained to reassert the rule thus declared as being sound and just, and, such being the case, we hold that it was the duty of the company to maintain its said sidewalk in a reasonably safe condition for pedestrians. And whether it was so maintained without a railing was a question for the jury under the evidence.

As to the contributory negligence of plaintiff, the company, while recognizing the rule that a traveler is not bound to depart from a way because it is defective, insists that as to the sidewalk in question "there was no change of conditions, nothing broke or gave way; there was nothing on the walk which the plaintiff did not expect to find; he was not surprised or entrapped; he knew every condition that he had to meet with, and the dangers, if any there were, were obvious;" and, "that under such circumstances, where there was a way which respondent considered dangerous and a way which was absolutely safe, that he was bound to choose the latter in order to be in the exercise of ordinary care." This is a strong presentation of the appellant's theory of the case, but we do not think the proper one. On the contrary, the rule has obtained in this state, that a pedestrian is not bound to depart from the usual way of travel, notwithstanding it may be defective and dangerous, unless the danger is so

Digitized by Google

great that a person of ordinary prudence, in the exercise of ordinary care, would avoid it by choosing some other and safer route. In this instance, the sidewalk had been used by the public both day and night for many years, notwithstanding its defective construction, which was a sufficient showing that the danger was not so great as to deter persons of ordinary prudence from using it for passage. "A person is not bound to abandon the use of a highway open to the public for the simple reason that it is known to him to be out of repair or in a defective condition." [Cohn v. The City of Kansas, 108 Mo. 387.] It is unnecessary to cite other cases to the same effect. It is there also said that: "The duty is, however, imposed on the traveler to use ordinary care to avoid the defect, and knowledge on his part that the street is out of repair is a circumstance to go to the jury in determining the question whether he did use such care."

Notwithstanding plaintiff in some parts of his evidence stated that he was not thinking about anything except getting home and going to bed, yet he insisted throughout that he was feeling his way with his feet at the time he fell off the sidewalk. And it is consistent to say that a person might well be thinking about the one thing and still doing the other. The matter was submitted to the jury whether he was in the exercise of ordinary care in an appropriate instruction offered by the defendant.

Many cases, where the circumstances are similar, have been called to our attention where the judgments have been upheld, but we think it unnecessary to notice them. There seems to be no difference of opinion as to the law, but the controversy is as to the application of the law to the facts of the case.

Finding no error in the trial the cause is affirmed. All concur.

Digitized by Google

# B. R. BEALL, Plaintiff in Error, v. BOARD OF TRADE OF KANSAS CITY et al., Defendants in Error.

Kansas City Court of Appeals, June 3, 1912.

1. **ARBITRATION: Filing Award: Judgment: Action on Award.** Notwithstanding an arbitration may be had under the provisions of the statute, and notwithstanding the award is not filed with the circuit court in the time required in order that it may be made a judgment of that court, yet it remains a valid arbitration and an independent action may be maintained on the award.

2. ———: ———: **Gambling: Future Delivery: Intention.** If it be conceded that an arbitration cannot be had on a claim arising out of a gambling transaction such as an option deal, yet where the evidence merely shows a transaction for the purchase of grain to be delivered in the future, without it appearing that there was no intention to deliver or to receive, it is not illegal and a claim thereon may be arbitrated.

3. ———: ———: **Speculation: Intention.** It is not all purchases on future deliveries, even though for speculation and the commodity is not on hand at the time, that the law condemns. There must be no intention to deliver.

4. ———: ———: ———: **Promise to Pay Debt of Another: Original Promise.** Where a corporation in embarrassed circumstances seeks a settlement of its debts by paying a part and one creditor refuses to settle unless the president of the corporation, individually, agrees to pay him the balance, and the president makes the promise, and the creditor thereupon settles and gives up his claim on the corporation, the promise of the president is not a promise to pay the debt of another, but is a promise to pay his own debt, and the Statute of Frauds has no application.

5. ———: ———: ———: **Board of Trade: Members: Controversy: Adjustment.** A and B were members of a board of trade, an unincorporated voluntary association. A corporation of which B was a member became indebted to the corporation of which A was a member. B's corporation was financially embarrassed and offered A's corporation thirty cents on the dollar in full settlement. The latter agreed to accept if B, individually, would agree to pay the balance. B promised to do so and A's corporation then accepted thirty per cent of its claim in full payment. B afterwards denied the agreement. *Held*, that this was a proper controversy for arbitration, and that an award in favor of A's corporation was binding.

Digitized by Google

Error to Jackson Circuit Court.—*Hon. W. O. Thomas*, Judge.

AFFIRMED.

*McCune, Harding, Brown & Murphy* and *E. C. Fletcher* for plaintiff in error.

(1) This was a statutory arbitration. The arbitration agreement was in writing, and provided that it should be carried out in conformity with the statute relating to arbitrations. Tucker v. Allen, 47 Mo. 490; Cochran v. Bartle, 91 Mo. 644; Valle v. Company, 37 Mo. 451; 2 Am. and Eng. Ency. Law (2 Ed.), 541; Erie v. Bent, 39 Fed. 409; Williams v. Watton, 9 Cal. 142; Deerfield v. Arms, 20 Pick. 480, 32 Am. Dec. 228; Holridge v. Stowell, 39 Minn. 360; Winne v. Edderkin, 1 Chan. 219, 52 Am. Dec. 159; Allen v. Chase, 3 Wis. 249; Pierce v. Kirby, 21 Wis. 125. (2) This arbitration is void, for the reason that it was not confirmed within one year from the date of its rendition. In re Taylor, 9 Mo. App. 538; R. S. 1909, secs. 875, 876, 881-2-5-6; 2 Am. and Eng. Ency. Law, 731; Anderson v. Anderson, 65 Ind. 196; Field v. Bissell, 36 Me. 593; Willingham v. Herrell, 36 Ala. 583; Bent v. Erie, 144 Mass. 165; Russell v. Clark, 60 Wis. 284.

*Frank Hagerman* and *Kimbrough Stone* for defendants in error.

(1) (a) The contention that the arbitration was statutory. Searles v. Lum, 81 Mo. App. 607; Triplett v. Sims, 89 Mo. App. 329; Williams v. Perkins, 83 Mo. 379; Osborn Co. v. Blanton, 34 S. E. (Ga.) 306; Unterrainer v. Seelig, 13 S. D. 152. (b) Failure to confirm the award. Hamlin v. Duke, 28 Mo. 166; Valle v. Railroad, 37 Mo. 445; Tucker v. Allen, 47 Mo. 488; Hotel Assn. v. Parker, 58 Mo. 327; Morse on Arbitration and Award, ch. 22, pp. 574, 575 and 576; R. S. 1909, sec. 891; Bowen v. Lazalere, 44 Mo. 383; Railroad

Digitized by Google

v. Calkins, 90 Mo. 542. (3) The arbitration was not compulsory. Board of Trade v. Nelson, 44 N. E. (Ill.) 743; Pacard v. Waite, 218 Ill. 138, 75 N. E. 779; Evans v. Chamber of Commerce, 91 N. W. (Minn.) 8. (a) As to option dealing. Mitchell v. Curran, 1 Mo. App. 463; Byrd v. Adem, 9 Ala. 755; Davis v. Went-67; Pierce v. Pierce, 60 N. H. 355; 2 Am. and Eng. Ency. Law 564. (b) As to the Statute of Frauds. Beall's promise not within statute. 29 Am. and Eng. Ency. Law, 912; Cross v. Richardson, 30 Vt. 648; Underwood v. Lovelace, 61 Ala. 155; Carlisle v. Campbell, 76 Ala. 247; Jolley v. Walker, 26 Ala. 690; Cole v. Justice, 8 Ala. 793.

ELLISON, J.—The defendant, Board of Trade of Kansas City, Mo., is an unincorporated voluntary association. Prior to 1905, plaintiff was a member of the association and he was likewise a member of and president of a corporation known as the Beall Grain Company. In that year he was suspended by the directors of the Board of Trade. Afterwards there was a sale, through the Board of Trade, of his membership certificate for the sum of $2655, and $500 of this amount was retained by the board as a fee for the transfer to the purchaser, who was elected a member, and the balance of $2155 was deposited with the secretary of the board of directors of the Board of Trade. It appears that the cause of Beall's suspension, and really of the sale of his membership in the Board of Trade, was a difficulty or dispute which arose between him and the Adams Grain Company as to an indebtedness to the latter from the Beall Grain Company which Adams, also a member of the Board of Trade, claimed Beall had assumed individually. This dispute was finally arbitrated before arbitrators selected by and under the regulations of the Board of Trade. The result of the arbitration was in favor of Adams. It further appears that the Board of Trade was about

Digitized by Google

to appropriate a part of the proceeds of the sale of plaintiff's membership to the payment of the arbitration award in favor of Adams Grain Company.

Plaintiff thereupon brought this action in equity, whereby he seeks, in the first count of his petition, to annul and set aside the award of the arbitrators, and in the second count he asks a judgment against the Board of Trade for $2155, the sum remaining in its hands from the sale of his membership after taking out the transfer fee of $500, as above mentioned. The Adams Grain Company intervened, claiming the money awarded to it by the arbitrators. There were also two other intervenors, but as this controversy is largely over the Adams claim, it will be unnecessary to refer further to them. The point insisted upon by plaintiff is that the award was void for the reason that the claim upon which it was based was illegal and not a subject of arbitration.

In order to become a member of the Board of Trade, it was necessary that each applicant should sign a contract of membership, pledging himself to obey and abide by the constitution, rules and regulations of the board. Among these rules was one providing for the arbitration and settlement of all disputes between members; the arbitration to be had before the regularly appointed board of arbitrators consisting of five members of the Board of Trade, with the right of appeal to five other members, constituting a "committee of appeals." Another rule empowered the board of arbitration to determine what claims were subject to arbitration. Another rule provided for the trial, and punishment by suspension, expulsion, etc., for failing to comply with the award of the arbitrators.

Stated in a general way, the claim of the Adams Grain Company against plaintiff arose as follows: The Beal Company was so incumbered with debts it could not pay out. The creditors, except the Adams

Digitized by Google

Company, agreed to settle for thirty cents on the dollar, and that company proposed to settle for that per cent and Beall's individual obligation to pay the balance. This was done, and the Beall Grain Company thereupon was released.

Afterwards it developed that Beall denied making the agreement individually to pay the balance in consideration of Adams releasing his company. Adams then proposed an arbitration as provided by the rules of the Board of Trade, and Beall refused. Adams then took proper steps for an order to arbitrate and the order was made. Beall then acquiesced, and both signed arbitration articles, whereby they agreed to submit the Adams claim, and that each would faithfully perform what was required by the award, and pay whatever sum of money should be awarded; and that they would abide by all by-laws, rules and regulations of the Board of Trade in reference to arbitrations. It was provided in said articles that if the award was made in writing it "may be entered on the records of the circuit court and that judgment may be had thereon in accordance with the terms thereof, and in pursuance of the provisions of the statute law of the state in cases of arbitration under said statute."

An arbitration was had, each party appearing with witnesses and no objection made by plaintiff to the right to arbitrate. The award being for Adams, plaintiff took an appeal to the appeal committee, where the award was affirmed. Plaintiff failed to pay it and Adams notified the board of directors of the Board of Trade, which body ordered him to pay. Still he failed, when Adams asked that he be disciplined for his refusal. Plaintiff wrote to the secretary of the board, asking that the directors defer any action "for one week with a view to bringing about some kind of an adjustment of the matter in the meantime." Action was postponed, but nothing was accomplished, when

Digitized by Google

he wrote the board the following letter: "I have used every effort to make a settlement with Mr. Adams for his claim against me, but have been unable to do so. I am financially unable to pay this claim at this time, but have offered to give Mr. Adams my note, payable $100 monthly, at six per cent interest, and, if my finances permit, I shall be happy to pay this claim as much sooner as possible. This is the very best I can do at this time, as all the collateral I have is tied up, and I trust that this will be satisfactory to your honorable board. Mr. R. T. Morrison, one of your associates, can testify as to the correctness of my financial condition." He was thereafter suspended by unanimous vote.

Under the rules of the Board of Trade no sale or transfer of membership could be made unless assessments were paid, as well as a transfer fee of $500, and membership not impaired and there be "no outstanding unadjusted or unsettled claims or contracts held by members of the association." With a knowledge of these rules and that he owed an assessment, and that the Adams claim, then settled by arbitration, was not paid, as well as two others, he solicited the board to sell his membership and to keep the money for payment on "legal and just claims." The following is his letter addressed to the secretary, dated the 24th of August, 1905: "You are hereby authorized to solicit sealed bids for the membership in the Board of Trade standing in my name, to be sold to the highest bidder, the proceeds to be paid to the directors for the benefit of all legal and just claims that may be filed and properly established against it."

In addition to this, there was evidence tending to show that he asked the secretary of the board to secure the written consent of Adams and the others to the transfer. The directors authorized the transfer to a party who had made the purchase. On the same day, but after the transfer had been made, plaintiff

Digitized by Google

notified the directors not to pay the Adams claim, and on the same day instituted the present action, it being claimed by him, as already stated, that it was not a demand which could be legally arbitrated.

Plaintiff claims the arbitration was a statutory proceeding, and not having been filed in the circuit court for confirmation, it was void. The statute on the subject of arbitration provides for judgment in the circuit court on an award after it has been filed for confirmation by that court, and that a motion for confirmation is not to be entertained after "one year from the publication of the award." [Sec. 876, R. S. 1909.]

But in our opinion even though the arbitration be considered a statutory one, in so far as that if it be not filed and confirmed in the circuit court within one year of its publication, no judgment will be rendered thereon in that court, yet it remains a special arbitration or settlement of a controversy between two members of the Board of Trade, and establishes the status of the one found against as a debtor to the other, and his consequent duty to pay. The fact that the successful party to an award does not file it in the circuit court, does not destroy it as an award, but only deprives him of that mode of enforcement. The award, itself, is a subsisting, substantial thing upon which an action may be brought independent of the statute. The statute itself authorizes a separate remedy. [Sec. 891, R. S. 1909.] And our courts have recognized the right. [Valle v. Ry. Co., 37 Mo. 445; Tucker v. Allen, 47 Mo. 488.] And so it is in Morse on Arbitration, 574-576. That author says that where a submission provides that judgment "may be entered on the award," as ours does, "the successful party may nevertheless sue upon it, if he chooses." So the same is decided in Dickerson v. Tyner, 4 Blackf. 253; Burnside v. Whitney, 24 Barb. 632, affirmed, 21 N. Y. 148.

This view disposes of the first five points against

Digitized by Google

the arbitration. But in addition, it is insisted that the arbitration was illegal and the award void, for the reason that the debt claimed by Adams arose from an unlawful transaction, viz., an option deal in grain, whereby plaintiff came to owe the Adams Company for his loss in such deal. This claim seems to be an afterthought. It is not mentioned in the pleading. The illegality set out in the pleading is that the claim was void in that it was founded on a verbal promise to pay the debt of another, and was therefore non-enforcible under the Statute of Frauds. It was not referred to in the evidence except in a few words at the close, and then failed in proof. Adams was asked on cross-examination if the indebtedness from plaintiff did not grow out of an option deal, and he answered, no, that it was a bona fide transaction, and no option in it. He conceded it arose from the sale of grain for future delivery, but was a real transaction.

Though plaintiff had testified in chief, at length, and made no reference or claim that the debt was illegal because of growing out of option deals, he was called in rebuttal and stated that "it grew out of some trades in grain for future delivery, or option trades." And that dealing in futures was commonly known as dealing in options. Then, when asked by the court to explain what he meant by "dealing in futures," said he meant "the purchase and sale for future delivery, commonly known by the trade as option dealing, or speculating on the market. For instance, you buy wheat for next May delivery, the man that buys it hopes to see the market go up, so he will make, and if it goes down he loses; that is all." He further said these transactions were "speculation in grain." We do not regard this evidence as showing an unlawful transaction. The statement by plaintiff that the debt grew out of a transaction in grain for future delivery does not show anything unlawful; for there is no impro-



Digitized by Google

priety in buying for future delivery, even though the seller has not the commodity on hand at the date of the contract. All speculation is not made unlawful by the statute. It is only transactions where no delivery or receipt in good faith is intended or contemplated, that the statute condemns it as gambling. [Connor v. Black, 119 Mo. 126; Deierling v. Sloop, 67 Mo. App. 446; Lane v. Logan Grain Co., 105 Mo. App. 215.] The testimony given by Adams was that it was a genuine transaction and not gambling; and while plaintiff stated, in words, that it was an option deal, that was a mere conclusion of his. For, in his explanation given to the court, he does not state facts making it unlawful. He says it was a purchase and sale for future delivery, and illustrates as we have above quoted. He does not say that no delivery by the one and receipt by the other was expected or intended.

Conceding (but by no means deciding) that a claim which could be avoided under the Statute of Frauds, is of such a class as not to be legally the subject of arbitration, the concession will not aid plaintiff, for the reason that the Adams claim was not a promise to pay the debt of another. The debt was originally that of a corporation of which plaintiff was president and stockholder, and Adams agreed to release the corporation from the whole debt upon the payment of thirty per cent of it, if plaintiff, individually, would assume the remaining seventy per cent. This was done, and the balance of the total sum thereby became plaintiff's obligation, and his promise was therefore a promise to pay his own debt. [Cross v. Richardson, 96 N. Y. 641; 29 Am. and Eng. Ency. Law, 912.]

It is true, as we said in Farmer v. Board of Trade, 78 Mo. App. 557, that an association like this, "though voluntary, cannot violate the law of the land. It cannot transcend the limits of natural justice, or the public policy of the state;" but we have not discovered in

Digitized by Google

the record where the defendant has fallen within these prohibitions.

Suggestion is made in plaintiff's statement, though not followed in his points and authorities, that the arbitrators gave weight to improper evidence to establish plaintiff's promise to pay his corporation's debt. This evidence was a written memorandum made by Adams at the time, as to what plaintiff agreed to do. It is, however, familiar law in matters of arbitration, that a mistake in the admission of evidence which would have been rejected in a court of law, will not vitiate an award. We do not mean to say the memorandum was improper evidence; for we see no reason why it was not competent in support of the memory of the witness who made it.

We have thus disposed of all substantial complaint against the judgment; and think it clear that the award in Adams' favor is valid and that it should be paid by the Board of Trade out of the money in its hands. We have not overlooked the charge of fraud in the arbitration, made in the pleadings filed by plaintiff. But have found that the record contains no evidence to sustain the charge.

After a thorough examination, we have not found anything which would justify our interference with the judgment, and it is accordingly affirmed. All concur.

---

## IVAN LINK, Appellant, v. J. W. JACKSON et al., Respondents.

**Springfield Court of Appeals, June 3, 1912.**

1. **BILLS AND NOTES: Fraud: Sufficiency of Evidence.** In an action on a promissory note defendants alleged that the note had been given as the purchase price of a horse, the sale of which had been procured through fraud. The plaintiff claimed to be an innocent purchaser of the note. The evidence is examined and *held* sufficient to establish the fraud.

Digitized by Google

2. ———: ———: **Innocent Purchaser: Burden of Proof: Instructions.** In an action on a promissory note where the defense is fraud and plaintiff claims to be an innocent purchaser and the evidence is sufficient to establish the fraud, the burden is upon the plaintiff to show that he purchased the note for value before maturity and without notice of the fraud, and an instruction is properly refused, which impliedly places the burden upon the defendant to prove notice of the fraud on the part of the plaintiff at the time he purchased the note.

3. **FRAUD: Pleading: Proof: Instructions.** A party basing an action or defense upon fraud cannot plead it in general terms, but must allege the facts upon which he relies as constituting fraud. He must then prove his case as he has pleaded it and the instructions should follow the proof.

4. **INSTRUCTIONS: Fraud: Failure to Define: Harmless Error: Self-Invited Error.** An instruction is assailed on the ground that the word "fraud" is not defined, but the error is *held* harmless because the evidence of fraud was not contradicted and if believed by the jury is so conclusive that it is apparent that the jury could not have been misled by the instructions. *Held, further*, that the instructions asked and given on the part of the appellant were open to the same objection and that he therefore cannot complain.

5. **FRAUD: Belief: Knowledge.** If fraud exists and a party has such knowledge of it as to cause him to believe that it exists and he acts upon that belief, the result is the same as if he had actual knowledge of the fraud and acted upon that.

6. ———: ———: ———: **Suspicion: Bills and Notes.** Where the defense in an action on a promissory note is that the note was procured by fraud but plaintiff claims to be an innocent purchaser, *held*, that if the note was procured by fraud then knowledge of facts bearing on that question which go no farther than to arouse suspicion are not sufficient. But when the impression made upon the mind by knowledge of facts relating to such fraud passes from the realm of suspicion and grows to belief, it then becomes knowledge.

7. ———: ———: ———. Knowledge of fraud to bind a party is knowledge of such facts, as would cause a reasonably prudent man to believe in the existence of the fraud.

8. ———: ———: ———. Where a party actually believes in the existence of fraud at the time he purchases the note, then it is immaterial how meager the facts may be which induce that belief.

Digitized by Google

9. **INSTRUCTIONS: Fraud: Knowledge: Definition: Bills and Notes.** In an action on a promissory note where plaintiff claims to be an innocent purchaser of the note that defendants allege was procured by fraud, an instruction which defined the word "knowledge" was *held* warranted under the facts in this case, but as a general rule the better practice would be not to undertake to define the word "knowledge" in an instruction.

Appeal from Texas Circuit Court.—*Hon. L. B. Woodside,* Judge.

AFFIRMED.

*Lamar, Lamar & Lamar* for appellant.

(1) Instruction 2 given for the defendants is wrong, misleading, is without evidence upon which to base it and is in direct conflict with the opinion of this court in the former appeal of this cause. Link v. Jackson, 139 S. W. 597. (2) It is true that the fact of knowledge may be shown by proof of facts and circumstances, but under the authorities, nothing short of actual knowledge on the part of the plaintiff would defeat his right to recover. 7 Cyc. 944; Hamilton v. Marks, 63 Mo. 167; Dickey v. Adler, 143 Mo. App. 332; Reeves v. Letts, 143 Mo. App. 199; Hayes v. Blaker, 138 Mo. App. 29; Bank v. Leeper, 121 Mo. App. 694; Bank v. Hammond, 104 Mo. App. 403; Jennings v. Todd, 118 Mo. 304; Mayes v. Robinson, 93 Mo. 122; Bank v. Hatcher, 134 Am. St. 498; Bank v. Hutler, 83 S. W. (Tenn.) 657; Cheever v. Railroad, 150 N. Y. 50, 55 Am. St. 646; Bank v. Morgan, 44 Am. St. 654; Kitchen v. Laudenback, 48 Oh. St. 177, 29 Am. St. 544; Swift v. Smith, 102 U. S. 442, 26 L. Ed. 193. (3) What is such fraud as will avoid a note is a question of law and questions of law are for the court and should not be submitted to the jury. Boot & Shoe Co. v. Bain, 46 Mo. App. 581; Casey v. Bridge Co.,

Digitized by Google

114 Mo. App. 65; Barton v. Odessa, 109 Mo. App. 82; Albert v. Besel, 88 Mo. 150. (4) A party may request an instruction to meet the theory of the case contained in an erroneous instruction given for his adversary. A party need not prepare an instruction for his adversary, nor must he offer an instruction to cure an error in the instruction of his adversary. Dawson v. Wambles, 123 Mo. App. 346; Behen v. Transit Co., 186 Mo. 442; Muirhead v. Railroad, 19 Mo. App. 648. (5) Fraud, in a legal sense, consists of certain facts, which should be set forth in an instruction where fraud is an issue, the same as a pleading. In pleading fraud the facts must be stated. Reed v. Bott, 100 Mo. 62; Barrie v. Railway, 138 Mo. App. 646; Nichols v. Stevens, 123 Mo. 96; Williams v. Railroad, 112 Mo. 495; Mateer v. Railroad, 105 Mo. 320; Hoester v. Sammelman, 101 Mo. 624; Smith v. Simms, 77 Mo. 269. (6) After defendants made a prima facie case of fraud in the origin of the note and after plaintiff showed by his testimony, fair on its face and uncontradicted, that he bought the notes before maturity for value it was then incumbent on the defendants to show knowledge of the fraud on the part of the plaintiff. Reeves v. Letts, 143 Mo. App. 199; Hayes v. Blaker, 138 Mo. App. 29; Bank v. Leeper, 121 Mo. App. 694; Bank v. Skeen, 101 Mo. 689; Bank v. Hainline, 67 Mo. App. 483; Poindexter v. McDowell, 110 Mo. App. 233; Davis v. Bartlett, 112 Oh. St. 534, 80 Am. Dec. 379; Bank v. Burgwin, 110 N. C. 267, 14 S. E. 263. (7) Technical terms should not be used in instructions without definition. Com. Co. v. Hunter, 91 Mo. App. 337; Dry Goods Co. v. Schooley, 66 Mo. App. 415; Mfg. Co. v. Ball, 43 Mo. App. 510; Ins. Co. v. Digby, 3 Mo. App. 603; Clark v. Kitchen, 52 Mo. 316; Speak v. Dry Goods Co., 22 Mo. App. 122; Boogher v. Neece, 75 Mo. 386; Mason v. Stock Yards, 60 Mo. App. 100; Jordan v. Moulding Co., 72 Mo. App. 325.

Digitized by Google

*Dooley & Hiett* and *W. E. Barton* for respondents.

(1) Instruction 2 on the part of the respondent and complained of as error by the appellant correctly declares the law. Link v. Jackson, 139 S. W. 593; Henry v. Sneed, 99 Mo. 497; Bank v. Rominee, 136 Mo. App. 62. (2) Appellant is held in the appellate court to the theory on which he presents his case in the trial court. O'Rouke v. Railroad, 142 Mo. 352; Tetherow v. Railroad, 98 Mo. 85; Morgan v. Mulhall, 214 Mo. 464; Howard v. Union, 94 Mo. App. 452; Brick Co. v. Railroad, 213 Mo. 729; Baker v. Independence, 106 Mo. App. 512. (3) The court did not err in not defining the word "fraud" used in instructions on the part of the respondents. The word "fraud" is not a word having a technical meaning but is a word of daily use and a jury of ordinary intelligence would have no difficulty in understanding its meaning. Christian v. Ins. Co., 143 Mo. 467; Kischman v. Scott, 166 Mo. 228; Fearry v. O'Neal, 149 Mo. 475. (4) If the failure of the court to define the word "fraud" used in the defendant's instructions was error, still plaintiff cannot complain because his own instructions exhibit the same fault. State ex rel. v. Fidelity Co., 94 Mo. App. 196; Gordon v. Park, 219 Mo. 612; Rouke v. Railroad, 221 Mo. 62; Campbell v. Tinker, 137 Mo. App. 444; Tube Works v. Machine Co., 201 Mo. 64.

COX, J.—Action upon a promissory note executed by defendants to A. H. Willard and by him assigned to plaintiff. The defense was fraud in procuring the note and against that defense plaintiff asserted that he was an innocent holder for value without notice. The note was given in payment for an interest in a stallion by defendant Jackson and the fraud alleged in procuring the note consisted in representations that the horse was a sure foal getter, which defendants alleged was false, and that for the purpose of inducing

Digitized by Google

defendant Jackson and others to purchase an interest in the horse, Willard, the payee in the note, and his agents entered into a fraudulent scheme by which they pretended to have sold certain shares in the horse to certain men of wealth and influence in the community and had these men give to Willard their checks apparently in payment for these shares and then Willard and his agents exhibited these checks to defendant and others and represented that these men had purchased shares in the horse, which was not true, and that the checks were afterwards returned to their makers and never collected. There was a trial by jury, judgment for defendants and plaintiff has appealed. This is the second appeal in this case. The first is reported in 158 Mo. App. 63, 139 S. W. 588, to which reference is made for a full statement of facts.

The errors assigned relate to giving and refusing instructions. The refused instructions asked by plaintiff amounted to a peremptory direction to find for plaintiff and were based upon the premise that the proof did not show fraud in procuring the note or if there was fraud in the first instance there was no evidence that plaintiff had any knowledge thereof when he purchased the note. These were properly refused as to the first proposition because there was abundant evidence of fraud in procuring the note. They were also properly refused as to the second proposition because not properly declaring the law, for the reason that they impliedly placed the burden upon defendant to prove notice of the fraud on the part of plaintiff at the time he purchased the note. If the note was procured by fraud, the burden was then upon plaintiff to show that he purchased it for value before maturity and without notice of the fraud as we held in this case on the former appeal.

The instructions given on behalf of defendant to which plaintiff objects are as follows:

Digitized by Google

No. 1. "The court instructs the jury that if you believe and find from the evidence that the note in suit was obtained from the defendant Jackson by fraud on the part of the said A. H. Willard and his agents, then the burden is on the plaintiff and he must show by the greater weight of the evidence that he bought said note before it was due, that he gave a valuable consideration therefor and that at the time he bought said note from the said Willard he had no actual knowledge of the fraud of the said A. H. Willard or his agents in procuring the said note from the said Jackson and that if the plaintiff has not made such proof by the greater weight of the evidence, then your verdict should be for the defendant."

No. 2. "The court instructs the jury that the words 'actual knowledge' as used in these instructions do not mean that the plaintiff must have known the truth of the fraud, if any, in procuring of the note in question from the defendant Jackson, in the sense which would enable him to testify to the facts of said fraud, if any, in this trial; but do mean that the plaintiff Link had such knowledge of said fraud, if any, as satisfies you that the said Link acted in the purchasing of said note in the belief, and not merely the suspicion, that said note, at the time he purchased the same, was procured by fraud."

No. 1 is assailed because the word fraud is not defined; that is, that the court should have told the jury what facts they would be required to find in order to find that the note was procured by fraud and not have left it to the jury to say what would constitute fraud. Generally speaking, plaintiffs' contention on this question is correct. A party basing an action or defense upon fraud cannot plead it in general terms but must allege the facts upon which he relies as constituting the fraud. He must then prove his case as he has pleaded it and the instructions should follow the proof. In this case, however, the evidence of fraud

Digitized by Google

was not contradicted, and if believed by the jury, is so conclusive that it is apparent that the jury could not have been misled by the instruction. Furthermore no instruction was asked by plaintiff which submitted the issue in any other form than that contained in defendant's instructions but the instructions asked by him and given, as well as those refused, were open to the same objection which he now makes against the instructions given in behalf of defendants and he therefore cannot now complain. [Gordon v. Park, 219 Mo. 600, 612, 117 S. W. 1163; Christian v. Insurance Co., 143 Mo. 460, 467, 45 S. W. 268; State ex rel. v. Fidelity Co., 94 Mo. App. 184, 196, 67 S. W. 958.]

The objection to instruction No. 2 for defendants is that "belief" and "knowledge" are not synonymous and no matter what plaintiff may have "believed" as to whether or not the note was procured by fraud, yet, if he did not have actual knowledge of it, he was not bound by it. If a fact exists and a party has such knowledge of it as to cause him to believe that it exists and he acts upon that belief, the result is the same as if he had actual knowledge of the fact and acted upon that. If the note in suit was procured by fraud and the plaintiff had such knowledge bearing upon that question as to cause him to believe that it was procured by fraud, then as far as his action in purchasing the note is concerned he knew that the note was procured by fraud. Belief is the conviction that arises in the mind as a result of knowledge of facts calculated to produce that conviction. If, as a matter of fact, the note was procured by fraud, then knowledge of facts bearing on that question which go no farther than to arouse suspicion are not sufficient, but when the impression made upon the mind by knowledge of facts relating to such fraud passes from the realm of suspicion and grows to belief, it then becomes knowledge. Knowledge of fraud to bind a party is knowledge of such facts as would cause a reasonably

Digitized by Google

prudent man to believe in the existence of the fraud, and if such facts were brought home to plaintiff in this case, he would be chargeable with knowledge whether he actually believed that the note was procured by fraud or not. If he actually believed in the existence of the fraud at the time he purchased the note, then it is immaterial how meager the facts may be which induced that belief. The evidence tending to show plaintiff's knowledge of the fraud was circumstantial and consisted of plaintiff's knowledge of the horse sold and his intimate association with Willard and in the fact that the note was endorsed "without recourse" and, in addition, it was shown that at one time, after defendant Jackson discovered the fraud, he went to Springfield to see Willard to try to get his note back and during the negotiations, plaintiff and Willard had a secret conversation together; and at the trial plaintiff testified that when he purchased the note he asked Willard why he endorsed it "without recourse" and Willard said he had a reason for it but refused to tell what it was. Since the burden was on plaintiff to show his want of knowledge of the fraud, and considering the peculiar condition of the testimony in this case, we think the instruction relating to plaintiff's knowledge of the fraud was warranted in this case, though we would say that, as a general rule, the better practice would be not to undertake to define the word "knowledge" in an instruction. Ordinarily the jury will need no assistance from the court in determining what the word "knowledge" means. Judgment affirmed. All concur.

Digitized by Google

# STATE OF MISSOURI, Respondent, v. R. E. MURPHY, Appellant.

**Springfield Court of Appeals, May 6, 1912. Motion for Rehearing Denied, June 3, 1912.**

1. **CRIMINAL LAW: Misbranding Non-Alcoholic Drinks: Information.** The information charging defendant with having in his possession with intent to sell certain non-alcoholic drinks, which were misbranded, is examined and *held* defective in failing to properly charge defendant with using the names of the manufacturers other than himself and in further using the word "manufactures" instead of "manufacturers."

2. **———: ———: ———: Naming Manufacturers.** The information charging an offense under the statute prohibiting the misbranding of non-alcoholic drinks, where it is alleged that defendant had used bottles bearing the name of manuturers other than himself, should name the other manufacturers whose names the defendant is charged with using, in order that he may know of what his alleged offense consists.

3. **———: Information: Indictment: Charge Must be Specific.** It is a settled rule of pleading in a criminal prosecution that the charge against the defendant must be sufficiently specific that the party charged will not be required to go beyond the information or indictment in order to learn the nature of the charge against him or to learn what issues he must meet.

Appeal from Greene Criminal Court.—*Hon. Alfred Page,* Judge.

REVERSED AND REMANDED.

*J. J. Gideon* and *J. C. West* for appellant.

(1) The information fails to charge that the bottles used by the defendant were bearing the name of some person or corporation, who were then and there manufacturers of the described drinks. Nor does the information charge that the Queen City Broom & Bottling Company or the Scholten Bottling Company, or either of said companies, then and there existed in Springfield, Missouri, or any other place; nor whether either or both are manufacturers; nor whether either

Digitized by Google

are persons, firms or corporations having an existence. State v. Patterson, 159 Mo. 102; State v. Jones, 168 Mo. 402; State v. Horned, 178 Mo. 62; State v. Kelley, 206 Mo. 693; State v. Clark, 223 Mo. 51. (2) The information must bring the defendant strictly and certainly within the terms of the offense described by statute and leave nothing to conjecture or inference and nothing is taken by intendment. State v. Latshaw, 63 Mo. App. 500; State v. Morrison, 64 Mo. App. 508; State v. Broeder, 90 Mo. App. 165; State v. Gassard, 103 Mo. App. 145; State v. Runzi, 105 Mo. App. 330; State v. Renkard, 150 Mo. App. 573. (3) The word "manufactures" as used in the information is not a misspelled word and while the scrivener may have intended to use the word "manufacturers" and follow the word of the statute, he did not; and the rule of *idem sonans* does not apply. State v. Clinkenbeard, 135 Mo. App. 191; State v. Fairlamb, 121 Mo. 153.

*J. H. Mason,* prosecuting attorney, for respondent.

(1) It is obvious that the first point relied upon by appellant for a reversal of the judgment of the trial court is untenable, all authorities cited in support of respondent's failure to allege in the information that the Queen City Broom & Bottling Company and the Scholten Bottling Company were copartnerships or corporations, has no application to the case at bar. Such a requirement only applies in cases involving buildings burglarized and property stolen, or converted, or wherein property rights are affected and is one of the essentials of the offense charged. State v. Clarke, 223 Mo. 51; State v. Kelley, 206 Mo. 693; State v. Horned, 178 Mo. 62; State v. Pollock, 105 Mo. 278. (2) True it is that the word manufacturers is not spelled in the information as the same appears in this enactment of the Legislature, still this cannot work harmful error to defendant as the

Digitized by Google

rule of *idem sonans* obviously applies in this case, as well as section 5115, Revised Statutes 1909, known as the Statute of Jeofails. State v. Lucase, 147 Mo. 70; State v. Miller, 156 Mo. 76; State v. Vaughn, 141 Mo. 514.

COX, J.—From a conviction upon a charge of having in his possession with intent to sell certain non-alcoholic drinks which were misbranded defendant has appealed.

The only question raised in this court goes to the sufficiency of the information which is as follows:

"J. H. Mason, prosecuting attorney within and for the county of Greene, in the State of Missouri, under his oath of office informs the court that R. E. Murphy, late of the county and state aforesaid, on the 26th day of July, A. D. 1911, at the county of Greene and state of Missouri, did then and there willfully and unlawfully have in his possession with intent to sell the same, certain non-alcoholic drinks, which non-alcoholic drinks were manufactured and produced by the said R. E. Murphy, to-wit: One bottle of Colo Coke, two bottles of Chocolate Soda, and one bottle of Strawberry Soda, which were then and there misbranded in this, that is to say, two of said bottles as aforesaid, were then and there branded Queen City Broom and Bottling Company, Springfield, Missouri, and two of said bottles were branded Scholten Bottling Company, Springfield, Missouri, and all were marked registered, said bottles then and there bearing the name of manufactures other than the said R. E. Murphy, who was then and there using the same, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state."

There are two objections to this information. First: Does not allege that "Queen City Broom and Bottling Company," and "Scholten Bottling Com-

Digitized by Google

pany," are corporations or partnerships or a trade name assumed by an individual.

Second: That it does not charge defendant with using the name of manufacturers other than himself.

This information is drawn under Session Acts 1911, pages 261 and 262, which is directed against the adulteration or misbranding of non-alcoholic drinks. The provisions of this act as far as applicable to this case are as follows:

"Section 1. Non-Alcoholic Drinks Not to be Adulterated or Misbranded.—That it shall be unlawful for any person, firm or corporate body, by himself, itself or themselves, or by his, her, its or their agents, servants or employees, to manufacture, sell, offer for sale, expose for sale, or have in possession with intent to sell, any article of non-alcoholic drink which is adulterated or misbranded, within the meaning of this act."

Section 4. "That for the purpose of this act non-alcoholic drink shall be deemed to be misbranded. . . .

"Third: If the bottle or receptacle containing it be one bearing the name or brand of a manufacturer other than the one using it whether or not the latter attaches a label to said bottle or receptacle so bearing a name or brand."

The intention of the prosecutor was to charge the defendant with using the names of other manufacturers, to-wit, "Queen City Broom and Bottling Company," and "Scholten Bottling Company," upon his own goods. To make this charge in a legal way it is necessary to name the other manufacturers whose names the defendant is charged with using in order that he may know of what his alleged offense consists and that he may be able to prepare a defense if he has any. Unless the "Queen City Broom and Bottling Company," or the "Scholten Bottling Company" was the name of another manufacturer the defendant cannot be guilty of a violation of the statute in using that name for he may use any name that he may wish upon

Digitized by Google

his own product so he does not use a name used by some other manufacturer. It is a settled rule of pleading in a criminal prosecution that the charge against the defendant must be sufficiently specific that the party charged will not be required to go beyond the information or indictment in order to learn the nature of the charge against him or to learn what issues he must meet. Looking to this information he could not know whether to prepare to meet proof that these manufacturers were corporations, or partnerships, or some individuals whose names are not given, using the names therein designated as trade names only. This information is open to the first objection made against it. [State v. Clark, 223 Mo. 48, 122 S. W. 665; State v. Kelley, 206 Mo. 685, 693, 105 S. W. 606; State v. Patterson, 159 Mo. 98, 59 S. W. 1104.]

This information is also bad in not charging that the names used by defendant were the names of manufacturers. "Manufactures" and "manufacturers" are not *idem sonans* but are separate and distinct terms with separate and distinct meanings, the one meaning the maker of the goods and the other the goods themselves. Judgment reversed and cause remanded. All concur.

---

## HUMPHREYS MERCANTILE COMPANY, Appellant, v. MAUD WALKER, Respondent.

**Springfield Court of Appeals, May 6, 1912. Motion for Rehearing Denied, June 3, 1912.**

1. **LANDLORD AND TENANT: Attachment: Action for Rent on House: Tender.** In an attachment suit by the landlord against a tenant for rent due on a house in a town or city, it is a sufficient defense to show that all the rent was tendered before the suit was brought and that the tender was kept good by deposit after suit.

Digitized by Google

2. ———: **Liens: No Lien for House Rent.** The landlord has no lien for rent on a house in a town or city. The statute, section 7888, Revised Statutes 1909, confines the lien for rent to crops grown upon agricultural land.

3. **DEBTOR AND CREDITOR: Payment: Tender.** Where a debtor before a suit tenders all that he owes and when brought into court keeps his tender good by a deposit with the proper officer, such tender and deposit amount to a payment, at the time of deposit, although the creditor did not accept it.

Appeal from Jasper Circuit Court.—*Hon. David E. Blair,* Judge.

AFFIRMED.

*Bates & Stewart* for appellant.

(1) In a suit by landlord against the tenant for a non-payment of rent, one of the grounds of the attachment is that the rent was due and unpaid at the time the suit was filed and that demand for payment had been made before the suit was filed. R. S. 1909, sec. 7896. The payment of the thirty dollars and costs that had accumulated up to that time to the constable after the suit was filed is a conclusive admission not only that she owed the thirty dollars, but that she owed the costs also. Voss v. McGuire, 26 Mo. App. 452; Transfer Co. v. Neiswanger, 27 Mo. App. 357. (2) The payment of costs therefore, to the constable after the suit was filed is an admission in effect that no offer to pay the thirty dollars had been made previous to the bringing of the suit, for if she had so offered no costs would have been owed. R. S. 1909, sec. 7451. (3) If defendant, respondent herein, had not desired to make an admission that this debt was due and unpaid and that she was liable for the costs that had accumulated at that time she could have taken advantage of sections 7454 and 7455, Revised Statutes 1909.



Digitized by Google

*W. R. Shuck, A. M. Baird* and *R. M. Sheppard* for respondent.

(1) The statutes of the state of Missouri giving the landlord authority to issue a writ of attachment to enforce the collection of his rent when the same is due, unpaid and demand had been made therefor replaced the common law right of distress for rent. R. S. 1909, sec. 7896; 9 Am. and Eng. Ency. Law, 619. (2) Under the common law the right of distress for rent did not exist after a legal tender by the tenant of the rent due, though the tender was not made until after rent became due. 9 Am. and Eng. Ency. Law, 629; 28 Am. and Eng. Ency. Law, 14; Tiffany v. St. John, 22 Am. Rep. 616. (3) It is a general rule of law that where a person has a lien as a collateral right, to enable him to enforce the payment of a debt, tender of the full amount of the debt destroys the lien. Courtright v. Canty, 21 N. Y. 366.

COX, J.—This action was begun by attachment before a justice of the peace for rent due upon a building in the city of Webb City. Plaintiff alleged the debt to be sixty dollars, secured a writ of attachment upon affidavit that the rent was due and unpaid after demand therefor, and the writ was levied upon certain personal property belonging to defendant and located in the building. Defendant filed a plea in abatement alleging that the amount of rent due was but thirty dollars and tender of that was made before suit and plaintiff had refused to accept it. Defendant was successful in the justice court and plaintiff appealed. On trial of the plea in abatement in the circuit court, the court struck out the testimony of defendant that she had tendered thirty dollars to plaintiff before suit and peremptorily directed the jury to find for plaintiff on the plea in abatement. Upon trial upon the merits the jury found for plaintiff for thirty dollars

Digitized by Google

only, and also found that defendant had tendered that amount to plaintiff before the suit was brought. On motion of defendant, a new trial was awarded upon the ground that the court had erred in the trial on the plea in abatement in excluding the testimony of defendant relating to the tender before suit. Plaintiff has appealed from the order granting a new trial.

It was admitted upon the trial that defendant after being sued in the justice court and before trial, deposited with the constable for plaintiff thirty dollars and all accrued costs. This appeal presents this question. Is it a defense to an attachment by the landlord against a tenant for rent due on a house in a town or city to show that all the rent was tendered before the suit was brought and that the tender was kept good by deposit after suit? We think it is. In a case of this kind the landlord has no lien for his rent. That is confined to the crops grown upon agricultural land. [R. S. 1909, sec. 7888.] There was no lien to foreclose in this case and the only way plaintiff could secure a lien before trial would be by levy of the attachment writ, and if plaintiff was in the wrong at the time the writ was levied, it could not be permitted to take advantage of its own wrong. If defendant tendered all that was due, it was plaintiff's duty to accept it. Defendant did all she could to pay this debt by tendering all she owed and when brought into court she kept her tender good by a deposit with the constable which at that time became a payment although plaintiff did not accept it. [Voss v. McGuire, 26 Mo. App. 452; Kansas City Transfer Co. v. Neiswanger, 27 Mo. App. 356.]

To uphold the attachment under such circumstances would place a landlord in position to oppress his tenant by forcing him to pay whatever was demanded or suffer the loss that would result from having his property taken away from him by attachment and retained in the custody of the officer until the liti-

Digitized by Google

gation should be ended. The statute authorizing an attachment for rent due and unpaid was not intended to permit such consequences as that. It is contended by appellant that tender is not payment and the only thing that can deprive plaintiff of its right to attach under section 7897, Revised Statutes 1909, is payment, and we are cited to Robbins et al. v. R. R., 132 Mo. App. 306, 111 S. W. 1179; Landis v. Saxton, 89 Mo. 375; Hudson v. Glencoe Gravel Co., 140 Mo. 103, 41 S. W. 450; and Knollenberg v. Nixon, 171 Mo. 445, 72 S. W. 41, as sustaining that position. Those cases, and others which might be cited, are cases in which the property was subject to a lien before tender of the debt and the tender was not kept good by deposit in court and under those circumstances it was held that tender did not destroy the lien. But in discussing the question it is said that in order to destroy the lien the tender must be kept good by a deposit in court or with the proper officer. Thus holding, *arguendo,* that a tender which is kept good by subsequent deposit does destroy the lien that existed before the tender was made. Surely then it should prevent the party from securing a lien after tender, and so those cases instead of being opposed to our position here are in harmony with it. Judgment affirmed. All concur.

---

## STATE OF MISSOURI, Respondent, v. DICK BIRRON, Appellant.

**Springfield Court of Appeals, June 3, 1912.**

1. **APPEAL AND ERROR: Criminal Law: Affidavit for Appeal: Affidavit by Attorney.** In a criminal case the statute makes no provision for an affidavit for appeal to be filed by an agent or attorney.

2. **———: ———: ———: ———.** In a criminal case an appeal will be dismissed where the only affidavit for appeal was made by the defendant's attorney.

Digitized by Google

3. ———: **Affidavit for Appeal: Unauthorized Person Making Affidavit.** An affidavit for appeal by a party not authorized by the statute to make it, is not merely irregular but is a nullity and places the party taking the appeal in the same position as he would be if the appeal had been granted without any affidavit being filed.

Appeal from Christian Circuit Court.—*Hon. John T. Moore,* Judge.

APPEAL DISMISSED.

*G. Purd Hayes* for appellant.

(1) If the affidavit was defective, or a nullity, respondent should have objected to the order of the trial court granting the appeal and saved an exception if his objection was overruled, which respondent did not do. (2) Respondent before he can be heard to complain should have saved his exceptions and had them incorporated in the bill of exceptions. R. S. 1909, sec. 5245; State v. Black, 99 Mo. App. 34; State v. McDonald, 85 Mo. 539; State ex rel. v. Broaddus, 210 Mo. 1; Marshall v. Estate, 144 S. W. 1120; State v. Meyers, 99 Mo. 117; State v. Griffin, 98 Mo. 675. (3) The trial court should not be convicted of error which it did not commit. State ex rel. v. Broaddus, 210 Mo. 16; Marshall v. Estate, 144 S. W. 1120.

*F. W. Barrett,* prosecuting attorney, for respondent.

(1) The right of appeal is statutory, and the statute must be strictly followed. State v. Anderson, 84 Mo. 524; St. Louis v. Gunning Co., 138 Mo. 374. (2) The affidavit for an appeal must be made by defendant and one made by his attorney is not sufficient. State v. Meed, 124 Mo. App. 413.

Digitized by Google

COX, J.—Prosecution in circuit court by information for common assault. Defendant convicted and fine of one dollars assessed and he has appealed.

Respondent has filed a motion to dismiss the appeal on the ground that no affidavit for appeal as required by the statute was filed. The affidavit was made by defendant's agent and attorney and no affidavit for appeal was made by defendant in person. The question is whether an appeal granted without an affidavit for appeal by the defendant in person in a criminal case confers any jurisdiction on the appellate court. The statute, Sec. 5292, R. S. 1909, provides: " . . . The defendant shall during the same term, file in the court his affidavit stating that such appeal is not made for vexation or delay but because he believes himself to be aggrieved by the judgment or decision of the court." The statute makes no provision for an affidavit for appeal to be filed by an agent in a criminal case as may be done in a civil case. The Supreme Court of this state has been very liberal in upholding appeals when objections to the affidavit went only to irregularities, and in such cases, the jurisdiction of the appellate court will be upheld in all cases in which the attention of the trial court was not called to the irregularities. [State ex rel. v. Broaddus, 210 Mo. 1, 108 S. W. 544.] But the holding has been uniform that an affidavit for appeal in substantial compliance with the statute is essential to confer jurisdiction upon the appellate court and if the record fails to show that an affidavit for appeal was filed, the appeal will be dismissed. [Shemell v. McKinney, 214 Mo. 692, 114 S. W. 1083.]

The right of appeal is purely a statutory right and the mode of procuring it therein provided must be substantially followed. The statute having provided that the party taking the appeal shall make the affidavit, no one else can make it for him. The statute providing for appeal to the circuit court from a con-

Digitized by Google

viction before a justice of the peace is the same as the statute providing for appeal from a conviction in the circuit court as far as the affidavit is concerned. [See Sec. 5001, R. S. 1909.] It has been expressly held that an affidavit for appeal by any person other than the party convicted is a nullity under that section. [State v. Meed, 124 Mo. App. 413, 101 S. W. 714.] We think that case properly declares the law and that the same rule applies to this case. An affidavit for appeal by a party not authorized by the statute to make it is not merely irregular but is a nullity and places the party taking the appeal in the same position as he would be if the appeal had been granted without any affidavit being filed. Appeal dismissed. All concur.

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

# COURTS OF APPEALS

AT THE

OCTOBER TERM, 1911.

---

## ELLEN HATCH, Appellant, v. C. W. BAYLESS, Respondent.

**Springfield Court of Appeals, March 4, 1912. Motion for Rehearing Overruled, May 6, 1912.**

1. **WITNESSES: Reputation of Party: Evidence: Appeal and Error.** In an action on contracts the defense was that the contracts had been altered or mutilated by plaintiff after delivery. The only evidence on this issue was that of plaintiff and defendant. The trial court permitted the introduction of the testimony of one of defendant's witnesses in the form of a deposition to the effect that defendant's reputation was good. *Held*, that the error was material and justified reversing the judgment. GRAY, J., dissents and *holds* that the error was not one justifying the reversal of the judgment, especially in view of the provisions of section 2082, Revised Statutes 1909.

2. **———: ———: ———: Relevancy of Party's Character.** In civil cases the character of neither party, until assailed, can be inquired into, unless it is put in issue in that class of cases such as libel, slander and malicious prosecution, when its value may be considered in assessing the amount of damages.

3. **APPEAL AND ERROR: Action at Law: Equity.** In an action at law the appellate court is not authorized to try the case *de novo* and reject the incompetent evidence, as it might do in a suit in equity.

4. **CONTRACTS: Alteration: Burden of Proof.** In an action on a contract where the defendant pleads an alteration, the burden is upon the defendant to show such alteration.



Digitized by Google

5. **APPEAL AND ERROR: Error of Trial Court: Presumptions: Prejudicial Error.** Errors of a trial court are presumptively prejudicial and it devolves upon the party asserting their harmlessness to show such fact affirmatively or the presumption will prevail.

6. **EVIDENCE: Admitting Incompetent Evidence: Presumptions.** Where a trial judge sitting without a jury permits incompetent evidence to be given it is fair to assume that he gave weight to such evidence in the formation of his judgment.

7. **APPEAL AND ERROR: Objections to Testimony: Depositions.** The objections of appellant to the question and answer of a witness offered in the form of a deposition and covering the general reputation of both parties to the action is *held* to be sufficiently specific and to be in fact two objections, one striking at the testimony covering defendant's reputation and the other as to the reputation of the plaintiff.

8. ———: ———: ———: **Bill of Exceptions: Immaterial Error.** Where appellant has made two objections to the admission of the question and statement of a witness in a deposition and after the objections the bill of exceptions contained the statement, "which objection was overruled by the court," the fact that the letter "s" was omitted from the word "objection" is wholly immaterial.

9. ———: ———: ———: **Exceptions.** Where two objections are made to the question and answer of a witness in a deposition and the court by one ruling overrules the objections one exception to such ruling is sufficient under the provisions of sections 2028 and 2029, Revised Statutes 1909.

10. ———: ———: ———. A party will not be permitted to speculate on his chances and wait until the witness has answered the question before making his objection, but this rule cannot be applied with the same effect where the evidence is given in the form of a deposition.

11. ———: **Trial Without Jury: Error in Admitting Evidence.** While appellate courts do not try a law case *de novo*, yet when the case was tried before the court without a jury, they do not attach the same importance to error in the admission of testimony that they do where the trial was by a jury. GRAY, J., in dissenting opinion.

Appeal from Wright Circuit Court.—*Hon. C. H. Skinker*, Judge.

REVERSED AND REMANDED.

Digitized by Google

*F. M. Mansfield, W. J. Boyd* and *Rechow & Pufahl* for appellant.

(1) Although there are alterations apparent on the face of the instrument, yet unless there is something suspicious about them, it will be presumed that they were made contemporaneously with the execution of the instrument. Paul v. Leeper, 98 Mo. App. 515; Bailey v. Bank, 99 Mo. App. 571; Cox v. Mignery & Co., 126 Mo. App. 682; Stillwell v. Patton, 108 Mo. 352; Kirkpatrick v. Wiley, 197 Mo. 163. (2) The presumption that an alteration of a written document was made prior to, or at least contemporaneous with its execution is not overcome as a matter of law by suspicious circumstances apparent upon the face of the document. Grimes v. Whitesides, 65 Mo. App. 1. (3) In civil action the character of neither party, until assailed, can be inquired into, unless it is put in issue by the proceeding itself. No attack had been made on the reputation of the defendant for honesty, truthfulness or uprightness and it was error to permit witness, Fenner, to testify to the same. Gutzwiller v. Lackman, 23 Mo. 172; Rogers and Gillis v. Troost's Admr., 51 Mo. 476; Dudley v. McCluer, 65 Mo. 241; Vawter v. Hultz, 112 Mo. 639; Black v. Epstein, 221 Mo. 304; Lbr. Co. v. Hartman, 45 Mo. App. 647; Grocer v. Targart, 78 Mo. App. 166; Gordon v. Miller, 111 Mo. App. 350; Stewart v. Watson, 133 Mo. App. 47.

*E. H. Farnsworth* and *Lamar, Lamar & Lamar* for respondent.

(1) Where a jury is waived and the case tried by the court, the finding by the court stands on the same footing as the verdict of a jury. Taylor v. Cayce, 97 Mo. 242; Bond & Stock Co. v. Houck, 213 Mo. 416; Irwin v. Woodmen, 104 Mo. 403; Vincent v. Means, 207 Mo. 709; Slade v. Foard, 131 Mo. App. 164; Rice v. Wade, 131 Mo. App. 334; Goodman v. Simmons, 113

Digitized by Google

Mo. 123; Tipton v. Christopher, 135 Mo. App. 619; Furniture Co. v. Toll, 133 Mo. App. 404. (2) *Non est factum* or payment and discharge, or release may be joined in the same answer. Nelson v. Brodhack, 44 Mo. 576; Garr, Scott & Co. v. Black, 120 Mo. App. 181; Bank v. Stewart, 136 Mo. App. 34; Ruff v. Miltner, 92 Mo. App. 620. The rule in this state is that defenses are not inconsistent unless the proof of one disproves the other. (3) The fifth, sixth, seventh and eighth points in appellant's brief are directed to the action of the court below in permitting portions of the deposition of one witness Fenner, referring to the said letters written to defendant by plaintiff to be read, and in refusing to exclude the statement of Fenner as to the good reputation of the defendant. This testimony was by deposition, the trial before the court and Fenner is the only witness who referred to the reputation of defendant, and although technically, this evidence may not have been admissible, plaintiff was not injured thereby and the error was harmless, especially when the trial was before the court. Sperry v. Cool, 207 Mo. 698; Gibbs v. Haughowout, 207 Mo. 384; Scharer & Martin v. Hill, 125 Mo. App. 382; Taylor v. Cayce, 97 Mo. 251; Easton v. Cranmer, 102 N. W. 944; Morris v. Moon, 120 S. W. 1065. (4) It is submitted on the whole that the finding and the judgment is for the right party and will not be reversed by this court for error not materially affecting the merits. R. S. 1909, sec. 2082; Finkelnburg's Appellate Practice, p. 110; Cross v. Gould, 131 Mo. App. 585; Vandiver v. Robison & Son, 125 Mo. App. 314; Steele v. Darner, 124 Mo. App. 338; Broderick v. Andrews, 135 Mo. App. 63; Burch v. Brandecker, 123 Mo. App. 470; Reynolds v. Reynolds, 136 S. W. 414.

F. M. McDAVID, Special Judge.—In March, 1902, the plaintiff and defendant entered into two separate contracts whereby the defendant promised and agreed

Digitized by Google

to pay the plaintiff the sum of five hundred dollars, upon conditions and terms in such contracts specified, each contract calling for the payment of two hundred and fifty dollars, in fruit trees, said sum of five hundred dollars being in payment for certain personal property sold by the plaintiff to the defendant at the time.

The suit was brought in the circuit court of Wright county, and was returnable to the September term, 1908. The petition is in two counts in the usual form, pleading the execution of the contracts, amounts due thereon, the conditions of same, a failure of the defendant to comply with their terms, and a prayer for judgment. The defendant in due course filed an amended answer duly verified, admitting that on the day alleged he executed two contracts, but averring that said contracts, after the execution and delivery thereof, had been changed, and, with a fraudulent purpose, mutilated, and that by reason thereof, the defendant was no longer liable thereon. The answer further alleged that the change and mutilation complained of is that the original contracts, as executed, had written thereon the time when the said apple trees were to be delivered, to-wit: Under the first contract (Exhibit "A"), they were to be delivered in the spring of 1903, and in the second contract (Exhibit "B"), they were to be delivered in the spring of 1904, and the defendant alleged that the parts of the contracts whereon was written the time specified for the delivery of these trees had been torn off, thereby rendering the contracts void. Further answering, the defendant alleged that he at various times, prior to the spring of 1903, wrote to the plaintiff, at the address left by her with him for that purpose, asking for shipping directions, and that she made no reply thereto; and that in the spring of 1903, he prepared, packed and boxed in good condition, ready for shipment, two hundred and fifty dollars worth of apple trees and delivered same at

Digitized by Google

the depot in West Plains, Missouri, ready for shipment. Failing to receive any shipping directions and failing to find any at West Plains, the defendant alleged that he took the trees back home and that he healed them in the garden, and that "healing," they died. As to the second contract, the answer does not aver any delivery of the trees, therein called for, at West Plains, but alleges that he reserved two hundred and fifty dollars worth of trees ready for delivery, as provided for in said contract, at any time during the spring of 1904, awaiting shipping directions from plaintiff, and that defendant requested from plaintiff such shipping directions and that plaintiff failed and refused to answer any of his communications; that by reason of such delay and failure of plaintiff, though the defendant carefully cared for said trees and held them ready for delivery, they died during the summer and fall of 1904, all to the damage of the defendant in the sum of two hundred and fifty dollars, the amount called for in said contract marked Exhibit "B."

Plaintiff by reply denies any mutilation of the contracts; denies that she tore off or detached any part of said contracts; and denies that the defendant delivered any trees at West Plains, Missouri, as provided for in the contract; and then generally denies all new matter pleaded in defendant's answer.

The testimony of the plaintiff and defendant tends to support their respective theories of the case and the allegations of their respective pleadings. As to the integrity of the contracts sued on and whether or not there had been any change or mutilation thereof, there was no testimony save and except that given by the parties to the action. One witness, to-wit, L. M. Fenner, who was postmaster at that time at Buckhart, Missouri, gave testimony tending to corroborate the testimony of the defendant respecting the writing by him of letters to plaintiff requesting directions for shipment of trees, and likewise corroborating him in his

Digitized by Google

statement that in the spring of 1903 he had hauled apple trees, boxed and ready for shipment, to West plains, Missouri. Over the objections of the plaintiff, this witness, whose testimony was introduced in this case in the form of a deposition, was permitted to testify concerning the general reputation of both plaintiff and defendant for truthfulness, honesty and uprightness, in the vicinity of Buckhart, where they resided, and was permitted by the court over such objections to state that the reputation of the defendant was good while that of plaintiff was bad.

The trial was to the court, a jury being waived, and judgment being rendered for the defendant, the plaintiff appealed. This is a sufficient statement of the facts.

Numerous errors alleged to have been committed by the trial court are presented to us for determination in the brief of counsel for appellant. We have considered all of the assignments of errors and have examined the authorities cited in support thereof, as well as the briefs—original, and supplemental—of counsel for respondent in reply thereto. However, in the view which we take of the case, and the conclusion we have reached, it will be necessary to discuss only one point, to-wit, the alleged error of the trial court in permitting evidence to be introduced as to the character of the plaintiff and of the defendant.

The authorities in this state on this subject are uniform and unambiguous. In civil cases, the character of neither party, until assailed, can be inquired into, unless it is put in issue in that class of cases such as libel, slander, and malicious prosecution, when its value is to be considered in assessing the amount of damages. [Vawter v. Hultz, 112 Mo. 633, 20 S. W. 689; Alkire Grocer Co. v. Tagart, 78 Mo. App. 166; Dudley v. McCluer, 65 Mo. 241.] So it unquestionably appears that in this case the trial court committed error in admitting evidence as to the defendant's gen-

Digitized by Google

eral reputation. But the respondent strenuously insists that this was not material error prejudicial to the rights of the appellant and that the judgment ought to be affirmed notwithstanding the error.

It is to be remembered that this was an action at law and not a suit in equity, and that the appellate court in such a case is not authorized to try the action *de novo* and in such trial reject incompetent evidence.

It is to be recalled in this case that the respondent alleged that the contracts sued on had been mutilated by plaintiff tearing from them, after they had been delivered, material stipulations as to the time of the delivery of the trees, with intent to cheat the respondent, which claim the plaintiff denied. There was no substantial evidence on this point save that of plaintiff and defendant. On the proof of such issue, the burden was upon the defendant, and hence his character and standing became a material factor in determining the value of his evidence.

It has been often declared by our Supreme Court —whose decisions are by constitutional mandate the law of this court—that errors of the trial court are presumptively prejudicial, and that it devolves upon the parties asserting their harmlessness to show such fact affirmatively or the presumption will prevail. [Barkley v. Cemetery Assn., 153 Mo. l. c. 317, 54 S. W. 482; Dayharsh v. Railroad Co., 103 Mo. 570, 15 S. W. 554; State v. Taylor, 118 Mo. l. c. 161, 24 S. W. 449; Bindbeutal v. Street Ry. Co., 43 Mo. App. 463; Morton v. Heidorn, 135 Mo. 608, 37 S. W. 504.] This principle was lucidly and logically stated in the Bindbeutal case, supra, by SMITH, P. J., as follows (l. c. 469): "Error and prejudice go hand in hand, until the latter, which is the creature of presumption, is met and neutralized by something in the record. It follows, therefore, that the interference of the appellate court with the judgment of the lower court can be successfully invoked by showing an error in the record; for when

Digitized by Google

error is shown the law supplies and attaches the consequence of prejudice." Also, by VALLIANT, J., in the case of Levels v. Railroad, 196 Mo. l. c. 617, 94 S. W. 275, as follows: "But it not infrequently happens that the duty of examining the evidence when it is conflicting devolves on the appellate court for the purpose of deciding whether an error occurring in the trial was of a character sufficiently serious to require a reversal of the judgment. Section 865, Revised Statutes 1899, forbids an appellate court to reverse a judgment unless it believes that error was committed in the trial court against appellant 'and materially affecting the merits of the action.' Sometimes, therefore, a judgment is affirmed although illegal testimony has been received or other error committed, if, upon the whole record, it is absolutely clear that the judgment is for the right party and that the error could not have affected the result of the trial. But when the case turns on a question of fact and the evidence is so conflicting that a verdict for either side can be said to have substantial evidence to support it, then the introduction of illegal evidence is a matter of more consequence than it would be in a case where the evidence in support of the verdict was substantially all one way."

The learned trial judge sitting without a jury permitted the incompetent evidence to be given over the objections of the plaintiff, and it is fair to assume that he gave weight to such evidence in the formation of his judgment. [Holmes v. Farris, 97 Mo. App. 305, 310, 71 S. W. 116; Kearney Bank v. Froman, 129 Mo. l. c. 430, 31 S. W. 769.] In the case of McDonald v. Matney, 82 Mo. 358, 366, the trial had been before the court sitting as a jury and the respondent made the contention in the Supreme Court that inasmuch as the cause was tried by the court without the intervention of a jury, the declarations of law were of no importance, except as indicating the theory on which the court proceeded, and that it was immaterial that im-

Digitized by Google

proper evidence was admitted if there was competent evidence to sustain the finding. The court said: "That is correct only where it is obvious that the incompetent evidence admitted did not induce the verdict, but how can we say that the court found its verdict on the other evidence, and that the record of the probate court, to no extent, influenced its finding? How do we know that if that incompetent evidence had been rejected, the verdict would have been for defendant? It is no answer to this, that the evidence would warrant a verdict for plaintiff, even if that read had been executed. This court is not to try the fact. That was the province of the court below, and it erred in admitting evidence without which it might have rendered a verdict for defendant, which this court could not have set aside as against the weight of evidence." In Walther v. Null, 233 Mo. l. c. 111, 134 S. W. 993, in equity case, LAMM, J., in discussing errors of the trial court in admitting incompetent testimony and the effect thereof, says: "But in a close case, or where a mass of irrelevant and prejudicial proof is allowed, we may never know what insidious effect the improper testimony had upon the mind of the trial chancellor. Such evidence tends to create an *atmosphere* about the case inimical to judicial and intellectual robustness and serenity of judgment. It puts the discriminating powers of the chancellor to a dangerous and unnatural test. It puts an enticing and alluring color in the case that tends to seduce the mind of the chancellor aside from the main traveled road to ultimate justice. It puts a mote in his mind's eye. It may put a question mark after his decree." These authorities make it reasonably clear that in so far as the admission of incompetent evidence is concerned, there is no distinction to be drawn in principle in legal actions tried by a jury or tried by the judge sitting as a jury. In either case, the error stands upon the same footing, and the same



Digitized by Google

rules are to be applied in determining whether the admission of the improper evidence constituted reversible error.

It is earnestly contended, however, by counsel for respondent, that even though this point raised by the appellant be well taken, yet that the objections and exceptions to this testimony are not sufficient to authorize the appellate court to find error in the ruling of the trial court.

The record shows that at the trial the defendant offered the deposition of L. M. Fenner who testified, in part, as follows:

"I know the general reputation of C. W. Bayless in and about Buckhart, Missouri, where he resided, for truthfulness and honesty and uprightness, and know that that reputation is good."

"I know also the general reputation of Mrs. Ellen Hatch in and about Buckhart, Missouri, for truthfulness, honesty and fair dealing, and I know her reputation is bad."

The record shows that the following objections were made: "The plaintiff objects to the question and statement in the deposition as to the general reputation of Bayless for truthfulness, honesty and uprightness, because no attack has been made on the reputation of defendant, and also objects to the testimony regarding plaintiff's general reputation for truthfulness in 1909 because that is not in issue, and asks that that part of the deposition be stricken out; which objection was overruled by the court, to which ruling the plaintiff then and there excepted."

It is apparent that the testimony as to the good character of the defendant Bayless was incompetent and that the testimony as to the bad character of the plaintiff Hatch was incompetent at the time it was offered. Now it is said that only one objection was made and that it was rightfully overruled because it was a general objection and part of the testimony was

Digitized by Google

clearly admissible. The record shows that the plaintiff (1) objected to the question and statement in the deposition as to the general reputation of C. W. Bayless, assigning a specific reason, namely, because no attack had been made on the reputation of the defendant; and also (2) objected to the testimony as to the plaintiff's general reputation for truthfulness, etc., in 1909, assigning a specific reason, namely, because it was not in issue. It will be seen from this record that there were two objections, the first levied specifically at the testimony as to the reputation of the defendant, and the second leveled specifically at the testimony as to the reputation of the plaintiff, and specific objections assigned. Neither one of the objections was general; they were each specific; there is not merely one general objection; there are two objections, and each is specific—each directed at what the plaintiff supposed was improper testimony, and the testimony objected to is pointed out and each objection applied to the part complained of. It is true that after the objections, this language appears: "Which *objection* was overruled by the court." However, the record on its very face shows that there were two objections and not one; and the fact that in making up the bill of exceptions the one doing so omitted the "s" on the word "objection" is wholly immaterial. The facts of this case, therefore, do not raise the same questions of law as were presented in Ray County Sav. Bank v. Hutton, 224 Mo. l. c. 50, 123 S. W. 47, and other cases cited. In that case, an objection was made to the entire deposition, and the court says that if there was any proper testimony in the deposition, the general objection to the whole is bad. That certainly is not a case like the present. Here, there is no general objection, but there are two specific objections, and counsel in this case properly segregated the good parts from the bad parts and leveled their objections specifically at what they supposed was improper testimony and ear-

Digitized by Google

marked it in a distinguishable way. In this they discharged their whole duty to the court.

It is further said that if we treat the objections as two separate objections, then but one exception was saved, and that is insufficient. Our statutes providing for exceptions (sections 2028 and 2029, Revised Statutes 1909) say that the exception must be made at the time the court makes the ruling and that there must be a separate exception to each ruling the court makes, but that these several exceptions may be embodied in one bill of exceptions. The common law practice is stated in Thompson on Trials, sec. 2806, to the effect that a single exception reserved to one or more rulings of the trial court in gross presents no question which can be considered on appeal. This rule would not seem to apply to the present case because there was one ruling only and consequently there could be but one exception. The court evidently considered that the testimony both as to the defendant's good reputation and as to the plaintiff's bad reputation was competent and by one ruling overruled the objections. So that this case does not present a condition in which there are two or more rulings of the trial court in gross and only one exception, but there is one ruling and one exception. It seems to me that the law was complied with.

In a supplemental brief the respondent makes the further point that the objection of plaintiff to this evidence which we are now considering was not made until after the testimony was in, and the question had been answered, and therefore came too late. The record in this respect is somewhat awkward in its form, and, as printed, tends in some degree to justify this contention. There can be no question but that under the decisions of the appellate courts of this state a party will not be permitted to speculate on his chances and wait until the witness has answered the question before making his objection; it then comes too late and should be overruled. [Stewart v. Watson, 133 Mo.

Digitized by Google

App. 44, 112 S. W. 762; Utz v. Insurance Co., 139 Mo. App. l. c. 556, 123 S. W. 538; Lutz v. Railway Co., 123 Mo. App. 499, 100 S. W. 46; Mann v. Balfour, 187 Mo. l. c. 304, 86 S. W. 103; State v. Pyles, 206 Mo. l. c. 632, 105 S. W. 613.]

It will be remembered, however, that in the case in hand, the evidence complained of was in the form of a deposition, and it is fair to assume that the objections thereto were made in the usual manner by noting same on the margin thereof. They are definite in form and point out the evidence complained of. In the above cases, the reason upon which the rule is based is that a party is not permitted to speculate on his chances or the result of an answer; but that reason fails and the rule cannot be applied with the same effect where both the questions and answers are patent to counsel and to the court, as in this case, where evidence is given in the form of a deposition. In such case, there can be no speculating by counsel on what the answer to a question may be, for the answer is before him. So we conclude that the rule invoked, and announced in the above cited cases, should not be applied here.

We hold, therefore, that the objection to this testimony was properly and timely made, and, being unable to declare as a matter of law that the error of the trial court did not materially affect the merits of the action, it follows that the judgment should be reversed and the cause remanded, and it is so ordered. *Nixon, P. J.*, concurs. *Cox, J.*, disqualified. *Gray, J.*, dissents and files separate opinion.

## DISSENTING OPINION.

GRAY, J.—I respectfully dissent from the majority opinion. The case was tried before the court without a jury, and the judgment is reversed and the cause remanded on the sole ground that the court permitted one witness to testify to the general reputation of the

Digitized by Google

defendant. I admit the evidence was not competent, but do not believe it in any wise effected the result. Since every witness is presumed to be truthful, testimony sustaining his character in that regard is only cumulative, and therefore, whether its admission was material error must be determined by all the circumstances of the case.

But one witness testified to the general reputation of the defendant. This witness did not appear in person, but his testimony was in a deposition, and in an answer to one question he said the general reputation of the defendant for truthfulness, honesty and uprightness was good. There was no other reference to the character of the defendant, and because the witness testified to something that the court would have presumed to be true without his testimony, this judgment is reversed and the cause remanded for another trial.

I fully believe the judgment would have been for the defendant had this testimony not been admitted. The evidence discloses that a Mr. Mills accompanied by a man who gave his name as Davis, visited the defendant and made a demand for the payment of the notes. Mills testified that the defendant admitted he had not paid the notes in money or apple trees, and made an excuse that he could not do so because he did not have the trees. The defendant denied this conversation, and this alleged Mr. Davis was not offered as a witness to corroborate Mills. The defendant testified, however, that this man's name was not Davis, but Hatch, and that he was the husband of the plaintiff. Subsequently a deposition was taken and the witness gave his name as Palmer, and a witness testified that he was acquainted with the plaintiff's husband and his handwriting, and that the signature of the witness, Palmer, to the deposition, was written by Hatch, the plaintiff's husband.

Digitized by Google

In addition to this testimony, another witness testified that he saw the man who visited the defendant with Mills, and that his name was not Davis, but Hatch, and that he was plaintiff's husband.

The deposition of the so-called Mr. Palmer was not offered in evidence, and the only testimony to contradict the three witnesses as to the identity of this man was the testimony of the plaintiff herself, who testified that her husband did not visit the defendant with Mills, and that his deposition had not been taken. She claimed that Davis and Palmer really existed, and that she had sent Davis to see the defendant about the payment of the notes, and at one time assigned the notes to Palmer. It is only fair to say that the preponderance of the evidence supported the defendant's theory that Davis and Palmer were only names assumed by plaintiff's husband, and that she must have known that fact. In addition to being thus contradicted by three witnesses, some testimony was admitted tending to prove that the general reputation of the plaintiff for truth and veracity was bad. With the plaintiff thus contradicted by three witnesses and her general reputation for truth assailed by one witness, it is perfectly apparent to me that the trial court would have found the issues for the defendant, even though the one witness had not testified that the defendant's reputation was good.

While the appellate courts do not try a law case *de novo,* yet when the case was tried before the court, they do not attach the same importance to error in the admission of testimony that they do where the trial was by jury. [Sheehan v. Stackhouse, 10 Mo. App. 469; Moore v. Mountcastle, 72 Mo. l. c. 607; Barnett v. Pepper, 114 Mo. App. l. c. 221, 89 S. W. 345; Lewis v. Frankle, 138 S. W. 64.]

I have never examined a record since I have been a member of this court that was absolutely free of error, and if every case is too be reversed because

Digitized by Google

error is found in the record, none will be affirmed. It seems to me that it is unreasonable to say that the judgment in this case was given to the defendant because one witness in a single statement said the defendant's reputation was good, and I believe in reversing and remanding the judgment, we do not give proper consideration to section 2082 of the Revised Statutes of 1909, which reads: "The Supreme Court, of Courts of Appeals shall not reverse the judgment of any court, unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action."

Digitized by Google

CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

# COURTS OF APPEALS

AT THE

MARCH TERM, 1912.

---

## ROLLA S. PAUL, Respondent, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted February 5, 1912. Opinion Filed March 5, 1912.

1. **APPELLATE PRACTICE: Rulings on Motions: Review: Necessity of Exception.** Orders sustaining plaintiff's motion to compel defendant to produce evidence, and overruling defendant's motion to vacate that order, cannot be reviewed unless embraced in the bill of exceptions; neither can they be reviewed unless an exception was saved at the time they were made, although they were made a ground of objection in the motions for new trial and in arrest of judgment.

2. ———: **Constitutional Question: Necessity of Exception.** While a constitutional question may be presented for the first time in the motion for new trial, when that is the first opportunity offered for its presentation, a constitutional question based on the sustaining of plaintiff's motion to compel defendant to produce evidence cannot be reviewed on appeal, when no exception was reserved at the time the ruling was made and the question was raised for the first time in the motions for new trial and in arrest of judgment.

3. ———: **Invited Error.** Appellant will not be heard to complain on appeal that respondent failed to adduce evidence to sustain a material issue, where evidence offered by respondent, tending to sustain such issue, was rejected, on appellant's objection, for immateriality.



Digitized by Google

4. **TELEGRAPH COMPANIES: Failure to Deliver Message: Action for Penalty: Regulation Requiring Written Presentation of Claim.** In an action against a telegraph company for the penalty provided by section 3330, Revised Statutes 1909, for the nondelivery of messages, *held*, by REYNOLDS, P. J., that, if the matter were for consideration as an original proposition, he would be inclined to hold that a regulation of the telegraph company, requiring notice in writing of the demand, as preliminary to the right of action for the penalty, is of no force.

5. ———: ———: ———: **Sufficiency of Evidence.** In an action against a telegraph company for the penalty for nondelivery of messages provided for by section 3330, Revised Statutes 1909, evidence *held* sufficient to authorize a recovery.

6. **APPELLATE PRACTICE: Conclusiveness of Verdict.** The credibility of witnesses and the probative value of testimony are for the trial court sitting as a jury, and its determination will not be reviewed on appeal.

Appeal from Montgomery Circuit Court.—*Hon. N. D. Thurmond,* Special Judge.

AFFIRMED.

*Geo. H. Fearons* and *G. Pitman Smith* for appellant.

(1) This statute is highly penal and must be strictly construed and the offense proven must come clearly within its terms. Is confined to negligence in transmission or delivery and liability under it cannot be enlarged. Edington v. Telegraph Co., 115 Mo. App. 98; Connell v. Telegraph Co., 108 Mo. 459; Cowan v. Telegraph Co., 149 Mo. App. 407; Wagner v. Telegraph Co., 133 S. W. 91; Peterson v. Telegraph Co., 37 N. E. 810. (2) The demurrer at close of all the testimony should have been sustained. (a) No offense under the statute was shown; (b) The office to which

Digitized by Google

message was addressed not being a night office was closed before the message was filed at St. Louis, and hence there was fault in neither transmittal nor in delivery, which is all the penal statute imposes; (c) Any attempt to transmit to or deliver at some other office would be entirely voluntary and clearly outside of any duty imposed by this statute; (d) The message was addressed to Wright City, Missouri, and no other place could be considered by the court. Cowan v. Telegraph Co., 149 Mo. App. 407; Peterson v. Telegraph Co., 37 N. E. 810; Edington v. Telegraph Co., 115 Mo. App. 98. (3) This penal statute cannot apply because there could be neither transmittal to nor delivery at the address named by the sender. Edington v. Telegraph Co., 115 Mo. App. 98; Cowan v. Telegraph Co., 149 Mo. App. 407; Peterson v. Telegraph Co., 37 N. E. (Ind.) 810; Jones on Telegraph Companies, p. 596. (4) No recovery can be had in this action, because no claim in writing was made to the telegraph company, as provided by its rules and regulations set forth in its message blank, and made a part of the contract with plaintiff, for sending the dispatch in question, notifying it of any failure of breach of duty in the transmission or delivery of the dispatch. Montgomery v. Telegraph Co., 50 Mo. App. 593; Thorp v. Telegraph Co., 118 Mo. App. 398; Grant v. Telegraph Co., 133 S. W. 673; Cowan v. Telegraph Co., 149 Mo. App. 407; Edington v. Telegraph Co., 115 Mo. App. 98. (5) The court compelled defendant, upon case being called for trial, to furnish testimony against itself in contravention of its rights under the Constitution and laws of the state of Missouri and under the Constitution of the United States and the amendments thereto. See Constitution of Missouri, art. 2, secs. 4, 11, 23 and 30; Constitution of United States, arts. 4 and 5, Amendments.

Digitized by Google

*Clarence A. Barnes* for respondent.

(1) The mere fact that the statute names a sum as the penalty to be recovered for its violation does not mean that in order to make out a case its violation must be proven beyond a reasonable doubt, as appellant would have us believe, and thereby adopt criminal procedure in enforcing it, for the statute itself places its enforcement in the hands of the person sending or desiring to send a dispatch, and further provides that the penalty is to be recovered by civil action, thereby clearly demonstrating that a most strict construction is not intended and that an action under the statute is not to be defeated in that way. R. S. 1909, sec. 3330; Jones on Telegraph and Telephone Companies, sec. 619, p. 597-8; Telegraph Co. v. Jones, 30 Am. St. Rep. 579. (2) The burden of showing a lack of written demand for the statutory penalty within sixty days of the date of the message was on defendant, and it should have been specifically pleaded in its answer, which was not done. Jones on Telegraph and Telephone Companies, sec. 505, p. 477; Telegraph Co. v. Troth, 84 N. E. Rep. 727; Telegraph Co. v. Scircle, 2 N. E. Rep. 604, 103 Ind. 227; Telephone Co. v. Trumbell, 1 Ind. App. 126, 27 N. E. Rep. 313; Hearn v. Telegraph Co., 36 Misc. (N. Y.) 557, 73 N. Y. Supp. 1077.

REYNOLDS, P. J.—This is an action under section 3330, Revised Statutes 1909, for the penalty given by that statute for failure on the part of defendant to use due diligence in transmitting and delivering a message delivered to it, and for failure to place the same in the hands of the addressee promptly and with impartiality and in good faith.

When the case was called for hearing before this court, counsel for appellant suggested that we had no jurisdiction inasmuch as the construction of the Con-

Digitized by Google

stitution of the United States and of this state was involved in the determination of the cause, and asked that the cause be transferred to the Supreme Court. Disposing of that, we are obliged to overrule it. A careful reading of the abstract furnished by counsel for appellant fails to show that counsel has saved any exception whatever to the adverse action of the trial court, over which action the constitutional question is claimed to have arisen. It appears by the abstract that prior to the trial of the cause, plaintiff filed a motion to compel defendant to produce certain papers in its possession material to the trial, to be used as evidence against defendant. The court sustained this motion and ordered defendant to produce the papers. Afterwards defendant filed its motion to rescind and vacate that order, on the ground that it was a penal proceeding and the defendant could not be compelled to furnish evidence against itself, and because the order to produce was in violation of defendant's right under the Constitution of this state and the Constitution of the United States and the Fourth and Fifth Amendments thereto. This motion to rescind was overruled, whereupon defendant produced the telegram and a letter in response to the order, the telegram being introduced at the trial and the letter offered but excluded. No exception whatever was saved at the time to this action of the court and no mention whatever is made to any of these matters in the bill of exceptions. They all appear in what purports to be an abstract of the record proper. They could only come before us for review by being embraced in the bill of exceptions proper, and they are not referred to in that. As appears by the bill of exceptions, when the telegram referred to was offered in evidence, it was introduced without objection or exception. The only subsequent reference to this motion and to the action of the court in ordering production of the telegram, which was the one delivered by plaintiff to be

Digitized by Google

transmitted, is in motions for new trial and in arrest. As has been held many times and in many cases by our Supreme Court, this is not sufficient to save the point; exceptions not saved at the time the ruling is made cannot be availed of by either a motion for new trial or in arrest of judgment. We hold that a constitutional question is neither properly presented nor saved and is not involved. [Hartzler v. Metropolitan St. R. Co., 218 Mo. 562, 117 S. W. 1124.] While a constitutional question may be presented for the first time in a motion for a new trial (Logan v. Field, 192 Mo. 54, l. c. 66, 90 S. W. 127), that must have been the first opportunity presented for its presentation. That was not the case here. It could have been, should have been, raised when the order for production of the papers was made. There is nothing properly before us to show that it was then raised, or if raised and overruled, that exception was then saved to the action of the court.

The petition in the case, after averring the failure of defendant to deliver the telegraph message and praying for judgment for the penalty given by the statute, avers that within sixty days after filing the message with defendant for transmission, plaintiff demanded of defendant in writing the payment of the statutory penalty and that defendant had failed and refused to make the payment.

As appears by the abstract of the record, on the blank of the message read in evidence, it is provided, among other things, that the company (defendant) will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission. It is insisted that no proof was made by plaintiff of this demand in writing. If this point was for consideration by the writer of this as an original proposition, he would be inclined to hold that this regulation of the telegraph company

Digitized by Google

requiring a notice of a demand in writing as preliminary to the right of action for the statutory penalty is of no force. While that provision may well apply to an action for damages, the writer is unable to see how it can have any application when the action is not for damages but for the statutory penalty, which fixes the amount of recovery, independent of whether any damages have been actually sustained or not, and awards one-third of the penalty to the public school fund. The writer agrees with the intimation which Judge ELLISON makes in Montgomery v. Western Union Telegraph Co., 50 Mo. App. 591, that as our law provides that one-third of the penalty shall go to the public school fund, it would appear doubtful whether the telegraph company can cut off the right of action unless written demand is made within sixty days. It would seem that the Statute of Limitations (section 1890, Revised Statutes 1909), giving three years for the institution of actions to recover penalties, cannot be abrogated by this regulation of the telegraph company, "a condition or limitation of its own making," says Judge BIGGS, speaking for our court in Barrett v. Western Union Telegraph Company, 42 Mo. App. 542, l. c. 547; a condition to which the public (the school fund) is in no sense a party. It has been distinctly decided by the Kansas City Court of Appeals, in Grant v. Western Union Telegraph Co., 154 Mo. App. 279, 133 S. W. 673, that this sixty days is a reasonable time within which the demand must be made and that the stipulation in question is valid. See, also, cases cited there in support of this holding. Learned counsel for respondent contends, and cites authority in support of his contention, that it was for defendant to prove want of demand. This position finds support in Kendall v. Western Union Telegraph Co., 56 Mo. App. 192, in which case the Kansas City Court of Appeals held (l. c. 196) that the defense of failure to make written demand was an affirmative one, to be

Digitized by Google

pleaded and sustained by defendant. In the case at bar, counsel for respondent, in his petition, distinctly tendered the issue by averring the demand within the sixty days, and the answer, a general denial, took issue with this. We might treat this as an unnecessary averment on the part of plaintiff, and as not taking from the defendant the duty of pleading and proving lack of written demand, but we do not pass on that. Nor is it necessary for us to pass on the question of a demand. It appears that when counsel for plaintiff offered in evidence a letter tending to prove that demand had been made of the defendant within sixty days, offering in support of this a letter which he had received from the superintendent of the defendant in reply to this demand this occurred: Mr. Barnes (attorney for plaintiff): "I offer in evidence the carbon itself of the original letter signed by me, which I made demand for the $300, from the Western Union. I merely offer it to show that demand was made on August 15, 1908." (The telegram was filed with the defendant August 10, 1908.) Objection was made to this by counsel for defendant, on the ground that no previous demand for the original had been made, the demand having been made of the attorney while in court and counsel for defendant stating that he knew of no such letter. After some discussion, counsel for plaintiff withdrew the offer "for the present." That counsel then offered in evidence the letter dated September 4, 1908, from the superintendent of the Western Union Telegraph Company to him, in response to the demand made. This was objected to, counsel for defendant stating that he did not know for what purpose the letter was introduced. Mr. Barnes, counsel for plaintiff, being sworn on behalf of plaintiff, testified that under date of August 15, 1908, he wrote to Mr. Frankel, superintendent of the Western Union Telegraph Company at St. Louis, put it in an envelope addressed to him, stamped it and mailed it, and on

Digitized by Google

the 4th of September, 1908, received from him in due course of mail, a letter which he offered in evidence. The court asked counsel if he meant that he was identifying the letter as the letter counsel received from Mr. Frankel, and directed that it be marked. Plaintiff's counsel then offered in evidence another letter. This was also objected to, counsel for defendant stating that the counsel for plaintiff had "proven that at such and such a time that he wrote a letter, and is offering now the letter, which he says he received in reply. I don't think that's sufficient proof of the letter," objecting that the signature and official character of Mr. Frankel had not been proven. The objection was overruled and defendant excepted.

The Court said: "You may object to the letter as evidence. I am overruling you simply on the identification of the letter. What's your objection to the letter? I haven't seen the letter. I don't know what's in it."

Mr. Smith (counsel for defendant): "Both letters purport to represent two letters written by the company."

The Court: "Read the letters over and if the court objects to them—"

Mr. Smith: "I object to the court reading the letters at all."

The Court: "What's the objection?"

Mr. Smith: "My objection is that it's irrelevant to any of the issues in this trial."

The Court: "What's the object of offering the letter, Mr. Barnes?"

Mr. Barnes: "I offer the letter for two purposes: First, to show under date of August 15th, we made demand for the payment of the sum we are now suing for, and for the further reason that this letter goes to show that they kept no record whatsoever of the message filed by Mr. Paul for transmission, as this letter



Digitized by Google

discloses that a thorough investigation on the part of the superintendent at St. Louis fails to disclose the message as it was filed by Mr. Paul."

The Court: "I suppose you can prove that, Mr. Barnes?" (Evidently referring to "the further reason.")

Mr. Barnes: "I don't have to prove that. I take it from all the circumstances, we are entitled to show the court that there was neither due diligence, promptness or impartiality in the transmission of this dispatch."

The Court: "I don't think that would even show that it's the fact. Why did you have to make a demand before bringing this suit?"

Mr. Barnes: "I am not insisting very much, if the court overruled; all I desire is to see that the record excepts."

The Court: "You get that altogether wrong. Mr. Smith objects to the introduction of the letter, and I am sustaining Mr. Smith's objection to the introduction of the letter."

Mr. Barnes: "We except."

This is followed by this entry: "To which ruling of the court plaintiff then and there excepted and saved his exception."

It appears very clearly from this that the plaintiff, assuming the burthen, which he had imposed on himself, of proving a demand, objection was made as to it, as being irrelevant and immaterial. The court seems to have taken that view, urged by the defendant's counsel himself and excluded the proof of demand. Counsel for plaintiff clearly and correctly, as we think, assumed that the court held it was not necessary to prove written demand. Counsel for defendant himself objected to proof of written demand as irrelevant to any issue in the case. That counsel now assigns as error the failure to prove demand. He is estopped from doing this by his own action. The lack

Digitized by Google

of proof of demand, if an error, was an error brought on by counsel for defendant himself; he cannot avail himself of it on this appeal.

The petition stated a cause of action under the provisions of the penal section upon which the suit is founded. The answer was a general denial. The trial was before the court without the intervention of a jury. There was evidence tending to prove that on August 10, 1908, plaintiff delivered a telegram, written on one of defendant's blanks for day messages, at an office of defendant in the Union Station, St. Louis, and to the operator of defendant there in charge of that office, addressed to "E. H. Ham, Care of Conductor Wabash No. 12, Wright City, Mo.," asking Ham to meet plaintiff that night at a hotel in St. Louis. The message was marked, "Filed 8:08 p. m." Plaintiff paid the charges demanded for transmission of the message. At the time of delivery of the message to the operator at Union Station plaintiff informed him that Mr. Ham was on the train, that they could catch him at Wright City and that he (Ham) could come on by the same train to St. Louis and meet plaintiff, otherwise Ham would get off at St. Charles, which is between St. Louis and Wright City, the latter being fifty-four miles and St. Charles twenty-three miles west of St. Louis. The train on which Ham was a passenger was due at Wright City that night at about nine o'clock, but that night was some ten or fifteen minutes late. Mr. Ham was on the train referred to that night. The next day as he was going west by train, when it reached Wright City he got off the train, met the telegraph operator there, whom he had known for five or six years, and asked him if he had a message for him. The operator told him he had none. It seems that after plaintiff filed the message with the operator at St. Louis, the address was changed by the operator or in the main office of the defendant at St. Louis, from Wright City to St.

Digitized by Google

Charles, but without the knowledge of plaintiff. It was not delivered to the conductor of the train when the train reached Wright City but was when it reached St. Charles. It was never delivered to Ham, who, on the train reaching St. Charles, and not having received the message, left the train, not being seen by the conductor and the conductor brought the message on to St. Louis and delivered it to the operator there. These facts were in evidence. There was no pretense of any obstruction to the line. The defense was that the operator, who was also railroad agent at Wright City, went off duty as operator at 6:30, but was on duty as station agent when the train reached Wright City. There was also evidence that messages received at Union Station by the operator there were sent by him to the main office in St. Louis and from there to their destination. There was no evidence that plaintiff knew this or that he was informed that the Wright City office was closed at or after 6:30 p. m.. Not receiving the message Mr. Ham did not go on to St. Louis. The time required to transmit a message from St. Louis to Wright City was a few minutes.

We think the evidence was sufficient to bring the case within the penal provisions of section 3330, Revised Statutes 1909. The credibility of the witnesses and the probative weight of the testimony were for the trial court and with its conclusion we cannot interfere. The finding was against defendant for the statutory penalty, and the judgment followed the statute, awarding two-thirds of the penalty to plaintiff and one-third to the school fund.

We discover no reversible error in the record and the judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

Digitized by Google

# N. DETOUL, Appellant, v. J. H. YEATER et al., Respondents.

**St. Louis Court of Appeals. Argued and Submitted February 6, 1912. Opinion Filed March 5, 1912.**

1. **MORTGAGES AND DEEDS OF TRUST: Reformation of Deed: Fraud: Sufficiency of Evidence.** In an action by the *cestui que trust* in a deed of trust to reform the deed by striking out a clause, providing that if the secured note was not paid before the death of the payee the debt would be canceled, on the ground said clause was inserted through the fraud and undue influence of the grantors, evidence *held* to support a finding that said clause was not inserted through the fraud or undue influence of the grantors.

2. **———: ———: Appellate Practice: Moot Questions.** Where, in an action by the *cestui que trust* in a deed of trust to reform the deed by striking out a clause, alleged to have been fraudulently inserted, providing that if the secured note, which was payable nine years after date, should not be paid before the death of the payee, the debt would be canceled, the trial court found that said clause was not fraudulently inserted, the appellate court will not consider what effect said clause has on the note, since that question could arise only in the event the *cestui que trust* died before the note matured.

3. **APPELLATE PRACTICE: Questions Reviewable: Moot Questions.** The appellate court will not determine moot questions.

Appeal from Montgomery Circuit Court.—*Hon. N. D. Thurmond,* Special Judge.

AFFIRMED.

*Nowlin & Hughes* for appellant.

(1) It is essential to a valid parol gift that it goes into effect at once and completely. If it regards the future it is but a promise, and being a promise without consideration, it can not be enforced, and has no legal validity. Mere words signifying an intent to transfer in the future are insufficient. Spencer v.

Digitized by Google

Vance, 57 Mo. 427; Vogel v. Gast, 20 Mo. App. 104; Tygard v. McComb, 54 Mo. App. 85; In re Soulard Est., 141 Mo. 642; School Dist. v. Shielding, 138 Mo. 672. (2) An allegation in the answer that the intestate before his death, "gave the note to the defendant, and made arrangements to have it delivered up to him, which was neglected to be done," is no defense; these facts constituting neither a *donatio causa mortis*, nor a valid gift or equitable release. Henderson's Adm. v. Henderson, 21 Mo. 379. (3) The note is to be considered as a separate and complete contract within itself, controlled in its terms by anything contained in the deed of trust, and the deed of trust is merely collateral to secure it. The note dominates the deed of trust and not the deed of trust the note. This note being in form a negotiable instrument shows conclusively that no present gift was made or intended. The deed of trust should be reformed to conform with the note. Owings v. McKenzie, 133 Mo. 323; Meads v. Hutchinson, 111 Mo. 620. (4) Where one stands in relations of trust and confidence with another who is old and failing in mind, the law presumes a contract between them to have been the result of undue influence emanating from the stronger party, and where inadequacy of consideration and mental imbecility concur, although the weakness of mind does not amount to idiocy or legal incapacity, the contract will be annulled at the instance of the proper party. Cadwallader v. West, 48 Mo. 483; Martin v. Baker, 135 Mo. 495; Studybaker v. Cofield, 159 Mo. 596; Reed v. Carroll, 82 Mo. App. l. c. 108.

*E. Rosenberger & Son* and *Delventhal & Hukreide* for respondent.

REYNOLDS, P. J.—This is a suit brought by appellant, plaintiff below, to reform a certain deed of trust executed by defendants to a trustee to secure

Digitized by Google

the payment of a note executed by defendants, husband and wife, for $735, to the order of plaintiff and his former wife, the note dated July 8, 1905, expressed to be "for value received," and to draw interest at the rate of six per cent per annum, interest to be compounded annually, and if not paid when due, the whole of said note to become due and payable, the note payable nine years after its date. The land upon which the deed of trust was given is situated in the county of Warren, this state. The deed of trust also dated and acknowledged July 8, 1905. recites that the parties of the first part (defendants, husband and wife), in consideration of the debt and trust mentioned and created and of the sum of one dollar to them paid by the party of the second part (the trustee), grants, bargains and sells, conveys and confirms unto the party of the second part the real estate described, in trust for purposes following: That is, setting out that Yeater and wife have that day made, executed and delivered to plaintiff and his wife, their promissory note of even date, by which they promise to pay to plaintiff and his wife or order, for value received $735, evidenced by the note which is set out verbatim, this follows: "The conditions of the above note and deed of trust are such that if the note is not paid off before the death of said N. Detoul and Nancy H. Detoul, then the same is null and void and the debt is cancelled." Following this is a provision that the deed of trust shall become void on payment of the "debt and interest in the said note," as they respectively fall due, but that in default of payment of either, the whole shall become due and payable and the deed remain in force; and the party of the second part (the trustee) or in case of his absence, etc., the acting sheriff of Montgomery county, at the request of the legal holder of the note, may proceed to advertise and sell the property to the highest bidder at the court house door in Montgomery county, Missouri, for cash

Digitized by Google

on twenty days' notice. The prayer is that the clause above quoted be stricken from the deed, it being claimed that it was procured by fraud and undue influence and inserted in the deed without the knowledge of plaintiff; that he was then not of sufficient mental capacity to understand what he was doing and that defendants took advantage of their relationship to him and imposed on him and procured this clause to be inserted. It is also averred that the insertion of the clause requiring the sale to be in Montgomery county instead of Warren county was a mistake of the scrivener, and it is prayed that this be changed and Warren county substituted in place of Montgomery county as the place of advertisement and sale.

The answer, after a general denial and specific denial of any fraud or imposition, claims that the note was given with the understanding between plaintiff and defendants, one of the latter being a nephew and the other a daughter of plaintiff and his wife, that if plaintiff and his wife died before the note matured it was to be considered as a gift to them.

The court heard the evidence and found for plaintiff as to the mistake in the name of the county and adjudged that the deed of trust be corrected so as to require the advertisement and sale to be made in Warren instead of Montgomery county, but denied the other correction demanded.

The learned counsel for appellant in a carefully prepared brief contend that the answer, not controverting the petition, sets up facts which would constitute a parol gift without delivery of the thing alleged to be given, and plaintiff's motion for judgment on the pleadings should have been sustained. They further argue that it is essential to a valid parol gift that it go into effect at once and completely, and that the facts set up in the answer showed neither a *donatio causa mortis* nor a valid gift nor an equitable release; that it is essential to a gift *inter vivos* that there should be

Digitized by Google

mutual consent between the donor and donee, the latter divesting himself of a thing in order to transmit the title to the donee gratuitously, and the latter to accept the donation and to acquire the legal title to the thing; that it must operate, if at all, in the donee's lifetime, immediately and irrevocably; it is a gift executed; no further act of the parties, no contingency of death or otherwise, is needed to give it effect; and that the delivery of property subject to be reclaimed by the donor at any time prior to his death, or where full control or power over the property or funds vests in the donee only after death of the donor, does not constitute a valid gift *inter vivos*. It is further argued that the note is to be considered as a separate and complete contract within itself, uncontrolled in its terms by anything contained in the deed of trust, the latter being merely collateral to secure the note; and that where one stands in relations of trust and confidence to another who is old and failing in mind, the law presumes a contract between them to have been the result of undue influence emanating from the stronger party and where inadequacy of consideration and mental imbecility concur, although the weakness of mind does not amount to idiocy or legal incapacity, the contract will be annulled at the instance of the proper party.

We may admit, although not deciding, that all these propositions are correct; the trouble with them is, that they do not meet the case before the court.

The learned trial court found that there was no imposition or fraud practiced upon the plaintiff or his wife in procuring the insertion of this clause in the deed of trust. A careful reading of the testimony concerning this satisfies us that the conclusion arrived at by the trial court is amply supported by the testimony in the case. There is not a word of testimony even tending to prove that this clause was inserted in the deed of trust at the solicitation or importunity,

Digitized by Google

or in yielding to the importunities of the defendants. There is nothing, in point of fact, to show that they participated in any way in having it inserted. It is true that the evidence shows that the plaintiff, who brings the action alone, his wife having in the meantime died and her interest in the note going to him, is a Frenchman by birth who can neither read nor write English, but it also clearly appears that he is conducting, and for many years had conducted, a business, not very large, it is true, in his own name and by himself, and that he is entirely capable of attending to any business transaction upon which he enters. The notary who drew up the deed and one or more witnesses testified that this clause was put in the deed by the express direction of the plaintiff himself. It further appears that after the execution of this instrument the defendant had promptly paid the interest as it accrued on the note. It further appears that after the execution of the note and deed of trust a breach of the friendly relations between the parties had occurred and that seems to be at the bottom of the attempt to have the deed of trust corrected. Therefore, there is no ground whatever for correcting this deed of trust, except in the change which the court made of the designation of the county in which the land was to be advertised and sold in case of default. What effect this clause in the deed of trust has on the note is not before us in this case. In our opinion that question can only arise and be presented in the event that plaintiff, appellant here, dies before the nine years which the note has to run; before the maturity of the note. The question then might arise between the legal representatives of plaintiff and these defendants, or the then holder of the note, if in the meantime it had been negotiated, as to the force and effect of this clause in the deed of trust. But it does not arise now and in this suit, which looks alone to the correction of the deed of trust.

Digitized by Google

It was urged before us in the argument of the case by the learned counsel for appellant, and it may be said here that respondents were not represented by counsel either orally or by brief, that the presence of this clause in the deed of trust affected the negotiability of the note. That may be, but that fact is not sufficient to warrant us in now undertaking to change the deed of trust, there being no sufficient evidence to show that this clause was put into the deed through fraud or imposition or was the result of failing mental faculties of plaintiff. All that we have before us by the record and the pleadings is the question of whether this deed of trust should be corrected by elimination of this clause. The question as to the effect of this clause in the deed of trust on the note is not before us; to now undertake to decide it would be to act on a question which may never arise; on a moot case. If plaintiff lives until the maturity of the note, it is to be paid; if default occurs in the payment of interest, the note matures and the deed of trust is in force. So that all the questions here sought to be presented would have disappeared.

Concurring with the learned trial court that the evidence is not sufficient to warrant action by the court as to this clause in the deed of trust, the judgment of the circuit court is in all things affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

Digitized by Google

# ROBERT A. CAMPBELL, Administrator, Respondent, v. WILLIAM R. HAYDEN et al., Appellants.

**St. Louis Court of Appeals. Argued and Submitted February 7, 1912. Opinion Filed March 5, 1912.**

1. **NEW TRIAL: No Reason Assigned: Review: Appellate Practice.** On appeal from an order sustaining, without assignment of reason, a motion for a new trial, one of the grounds of which was that the verdict was against the weight of the evidence, the court will examine the whole record to see whether the state of the evidence authorized such action.

2. **EXECUTORS AND ADMINISTRATORS: Gifts: Action for Money Had and Received: Sufficiency of Evidence.** Evidence, in an action by an administrator for money turned over by decedent to defendants, *held*, while authorizing a finding to the contrary, to authorize an inference by the jury, that such turning over was not intended by decedent nor treated by defendants as absolute, either under a contract for care of decedent by defendants, or as a gift *inter vivos*.

3. **NEW TRIAL: Verdict Against Weight of Evidence: Review: Appellate Practice.** Where there is evidence authorizing a verdict either way, depending on the credit given witnesses, the granting of a new trial on the ground that the verdict is contrary to the weight of the evidence is a discretionary matter, and will not be disturbed on appeal.

4. **EVIDENCE: Expert Testimony: Opinion of Physician.** It being within the province of a physician to testify to the condition, the objective symptoms, of a deceased person when he attended him, it was competent for the physician to testify, after stating that decedent's conversation, by reason of his malady, was generally confined to "Yes" or "No," that his condition was one "in which the mind was not impaired but the way of expressing was the impairment."

5. **———: Declarations of Deceased Person: Executors and Administrators.** In an action by an administrator for money turned over by decedent to defendants, the issue being whether he had given it to them absolutely or under a contract whereby they were to take care of him, or whether they were merely to take care of it for him, defendants were entitled to introduce the testimony of decedent's nurse as to what he said to her about giving his property to them.

Digitized by Google

6. **DEPOSITIONS: Objections to Form of Question.** Under section 6413, Revised Statutes 1909, objections to the form of questions asked in a deposition must be made at the time the deposition is taken.

7. **NEW TRIAL: Sympathy, Passion and Prejudice of Jury: Review: Appellate Practice.** By reason of the better position of the trial court to determine whether or not a jury was swayed by sympathy, passion or prejudice, its action in sustaining a motion for a new trial on one of these grounds will not be disturbed on appeal.

**NORTONI, J., concurs in result.**

Appeal from Pike Circuit Court.—*Hon. David H. Eby*, Judge.

AFFIRMED AND REMANDED.

*Pearson & Pearson* and *J. H. Blair* for appellants.

(1) When a trial court sustains a motion for new trial generally and gives no specific reason for its action, the appellate court is driven to take into consideration all the grounds assigned in the motion, and if any one of them is sufficient to justify the action of the court, to affirm the judgment. Fink v. McCue, 123 Mo. App. 313; Roll v. Bank, 167 Mo. 406; Ordelheide v. Land Co., 208 Mo. 239; Stoner v. Royar, 200 Mo. 444; Pierce v. Lee, 197 Mo. 480; Lead & Zinc Co. v. Webster, 193 Mo. 351. (2) It is suggested that it might be presumed, that the trial court in the case at bar based its finding on all the reasons set forth in the motion for a new trial; and that would include the reason that the verdict was against the evidence. Such presumption, would also include the twenty-sixth reason set forth in the motion for new trial, to-wit: "Because there is no evidence to authorize a verdict for defendants;" then there would be contradictory reasons assumed to have been had in his own mind by the trial judge for granting a new trial, and, this would not be allowed by the appellate court, to stand. Crawford v. Stock Yards Co., 215 Mo. 394; Pierce v. Lee,

Digitized by Google

197 Mo. 480. Again, there is never a presumption in favor of the action of a trial court in a neglect of duty, or in a willful violation of the law, either one of which works an injustice to appellant. Stoner v. Royar, 200 Mo. 444; Pierce v. Lee, 197 Mo. 480; Roll v. Bank, 167 Mo. 406. (3) The right of appeal from an order granting new trial, is a substantial right, which the statute gives the losing party, and the trial court has no right either by neglect of its duty, or by willful violation of the law, to jeopardize this right, or deprive him of it. Ordelheide v. Land Co., 208 Mo. 239. (4) Under no circumstances will the appellate court presume, that the reason that the trial court granted a new trial, and sustain the order of the court granting a new trial, unless it finds from the entire record, that there was conflicting testimony, given on the part of the plaintiffs and the defendants. This could not be determined, without a careful examination of the entire record. Schumacher v. Dist. Co., 142 Mo. App. 343; Dickmann v. Hesspos, 141 Mo. App. 119; Sharp v. Odium, 121 Mo. App. 565; Bank v. Wood, 124 Mo. 72; Bank v. Huters, 87 Mo. App. 534. Appellants' contention, in the case at bar, is that there is no conflicting testimony on the material issues raised by the pleadings and the evidence in this case; and, that the reasons for the court granting a new trial in the case, was upon other grounds than that of the weight of testimony.

*Ball & Ball* and *David A. Ball* for respondents.

(1) The granting of a new trial rests within the sound discretion of the court. Farrell v. Transit Co., 103 Mo. App. 454; Coleman v. Cole, 96 Mo. App. 22; Roden v. Transit Co., 207 Mo. 392; McCarty v. Transit Co., 192 Mo. 396; Gould v. St. John, 207 Mo. 619. (2) The court has a right to grant a new trial in either a law or equity case if it is satisfied the verdict or finding is against the weight of the evidence. Hurley v. Kennally, 186 Mo. 225. (3) A trial court has

Digitized by Google

large discretion to grant new trials to accomplish justice, and the court's action will not be disturbed on appeal unless it appears that it used its discretionary power in an arbitrary or wrongful manner. Cook v. Railroad, 56 Mo. 380; Taylor v. Railroad, 163 Mo. 183; Lovenhart v. Railroad, 190 Mo. 342.

REYNOLDS, P. J.—This is an action instituted by the administrator of one Absalom T. Hays against the defendants to recover $7114.19 and interest, alleged by plaintiff to be of the estate of his intestate. The answer of defendants, admitting that they had received from Absalom T. Hays, in his lifetime, the principal sum above specified, claimed that under and by virtue of a contract between them and the decedent, by which they were to care for, support and maintain him as long as he should live, he was to turn over to them all of his property and estate, and that in compliance with that agreement he had given and turned over to them the money specified in the petition, and that in order to enable them to collect this money, which was in a bank in the state of Montana, he had given them a power of attorney under which they had collected the money; that it was their own, held by them under and by virtue of the contract and understanding above mentioned, which they allege they had fully carried out and had nursed, cared for, supported and maintained the decedent for the remainder of his life and until his death. Originally defendants interposed a counterclaim, but abandoned it at the trial.

The reply, admitting that defendants had cared for the decedent, avers that the money collected by them under the power of attorney was collected not in their own right as owners but that defendants collected that sum for the decedent and were accountable for it to his administrator.

On the trial before the court and a jury a vast

Digitized by Google

amount of testimony was introduced by the respective parties to sustain their several contentions.

It appears that the decedent, an old man over seventy, and the uncle of defendants, was stricken with paralysis while in Montana. More accurately, as described by one of the physicians who attended him when he was first stricken, his affliction was apoplexy, commonly called paralysis. He was at first completely paralyzed but afterwards recovered the use of his limbs on one side. As described by another of the physicians, who had also attended him when first stricken, while decedent was at first completely helpless, later along he could move his arm and leg and got so he could say several words; could say "Yes" and "No," and when he was angry he would swear. Beyond this, while he could say a few words, he could not carry on a connected conversation understandingly. His hearing appears to have been unimpaired and persons carried on conversations with him by asking him questions which he would answer by "Yes" or "No." He was not afflicted mentally. According to his physicians his mental condition was all right; it was an impairment of the mind acting on the body; persons so afflicted can think well enough but when it comes to expression, they become "muddled" so that they cannot convey their ideas to others. "That is not a mental trait, it is a material trait," said one of these physicians. He remained in this condition until he died in Pike county, this state, some eighteen months after his removal to this state. While in this condition and in Montana and not in the presence of his nephews, these defendants, he expressed his intention to a lady who was nursing him and in whose hospital he was then confined, of giving all his property to these nephews. They removed him from Montana to Pike county, in this state. Sometime after his arrival in Pike county, he executed one or more powers of attorney, authorizing these two defendants to col-

Digitized by Google

lect all his moneys, take charge of all his property and transact business for him. When he was brought back to Missouri and while confined to his bed or his room at the house of one or the other of the defendants, in answer to questions of various parties as to whether it was a fact that he had given all his property to these two defendants, he very emphatically indicated that he had done so, doing this both by word, that is answering "Yes," to the question and by raising his hand and indicating by uplifting two of his fingers that he had executed the powers of attorney in favor of both and had given all his property to both.

There was testimony, however, on behalf of plaintiff tending to show that the defendants themselves had acted as to this money and property as if it still belonged to their uncle; also testimony tending to show that in drawing on the money after it was in bank they had drawn on it as under the power of attorney and not as in their own right, and that they or at least one of them, had reported it to plaintiff as of the estate of the decedent when plaintiff, as administrator, was listing the estate.

It cannot therefore be successfully maintained that the evidence in the case was all one way and that it was not susceptible of two inferences, one in favor of defendants and sustaining their contention that the turning over of the property was absolute, either under contract or as a gift in the lifetime of the decedent; the other testimony from which a jury might infer that it was not either so intended or so treated by defendants themselves. It may be true that the testimony as to this latter phase of the case is not as strong and direct as the testimony sustaining the other theory, but it cannot be said that the testimony beyond all question was of such a character as to inevitably lead to but one conclusion.



Digitized by Google

After being instructed by the court, the jury returned a verdict in favor of defendants, whereupon plaintiff interposed a motion for new trial, assigning thirty-three grounds why a new trial should be granted. The court sustained this motion and granted a new trial, without specifying upon which of the thirty-three grounds the new trial was granted. From this order granting a new trial, defendants have duly perfected their appeal to this court.

It is earnestly contended by the learned counsel for the appellants, that when the trial court either failed or neglected to assign reasons for granting a new trial, the burden is upon the appellate court to review the whole record and determine for itself upon all the evidence as to whether or not any one of the grounds assigned in the motion for new trial was sufficient or would justify the court in sustaining the motion and granting a new trial, and this, say counsel, includes the ground that the judgment was against the weight of the evidence, counsel conceding that where one of the grounds assigned is that the verdict is against the weight of the evidence, that the action of the court in sustaining a motion for new trial will not be disturbed, unless the appellate court finds from the entire record that there was no conflicting testimony. It is further earnestly contended that an examination of the entire record will satisfy this court that there is no conflicting testimony on the material issues raised by the pleadings and the evidence in the case, and that the reasons for the court granting a new trial were upon other grounds than that of the weight of the testimony, as to which other grounds, it is claimed, there was no basis for the action of the trial court. We agree with those learned counsel on the proposition that under this assignment, that the verdict is against the weight of the evidence, it is our duty to examine the whole record. That proposition is fully

Digitized by Google

sustained by the decisions of our Supreme Court in Pierce v. Lee, 197 Mo. 480, 95 S. W. 426; Ordelheide v. Berger Land Co., 208 Mo. 239, 106 S. W. 620, and cases there cited, as well as in many other decisions of our Supreme Court. In the Ordelheide case it is distinctly said (l. c. 244) that the right of appeal from an order granting a first new trial would amount to nothing if the action of the trial court was not subject to review in the appellate court.

With this proposition in mind, we have examined with great attention the entire testimony in this case as abstracted. In point of fact the "abstract," so-called, is almost a complete and literal transcript of all the testimony as given in the case. We have given a very brief synopsis of its tendency and general effect. As appears by that summary, the testimony was of such a character that it was peculiarly within the province of the jury to draw one or the other inference from it; to determine on that evidence for one or the other party, dependent on the weight that the jury gave to the testimony, not measured by the number of witnesses and by what they said, but by their demeanor, the impression they made upon the jury as to their reliability—in short, the credibility the jury should give to their testimony. This is clearly and entirely for the determination of the jury in the first instance. But it is here that the discretionary power of the trial judge intervenes. He has practically an uncontrollable supervision of a verdict in such a case. We know of no well considered case in this state in which the appellate court has held that it will interfere with the action of the trial court in granting a new trial, on the ground that the verdict is against the weight of the evidence, if that is one of the grounds stated in the motion, provided the appellate court is satisfied that the evidence did not inevitably warrant but one conclusion. As that ground is one of the thirty-three assigned in this very voluminous motion for a

Digitized by Google

new trial, we are unable, on a reading of the whole record, to say that the learned trial court erred in setting aside the verdict in this case on that ground.

As to the other thirty-two grounds alleged in the motion for new trial, all but one of them going to the admission and exclusion of testimony and to the giving and refusal of instructions, a careful consideration of the rulings and of the action of the trial court fails to show any error to the prejudice of plaintiff. In point of fact, if there is any criticism to be made on the action of the trial court in the exclusion of testimony, it is not improper to say that it appears that the court had exercised its power in the exclusion of testimony more favorably toward plaintiff than toward defendants. For instance, in the action of the trial court in excluding certain answers in the depositions of several of the witnesses for defendants, we think that whatever error there was, was against defendants and not against plaintiff. To illustrate, in the cross-examination of Dr. Wilson, when describing the condition of the decedent, after stating that the conversation carried on between the decedent and other persons was confined generally on his part to saying "Yes" or "No," the witness stated that Miss Stoner, the lady in whose hospital the decedent was confined when he was first stricken in Montana, was with him all the time and that she "had the knack of getting on to what he wanted;" that she had become so accustomed to him that she could intuitively guess at what he wanted and ask him if that was it and he would assent or not. The physician then stated this: "It was a condition in which the mind was not impaired but the way of expressing was the impairment." This sentence, together with what we have stated as immediately preceding it, was stricken out on objection of counsel for plaintiff. We think that was error. It was within the province of this physician to state the condition of his patient, the objective

Digitized by Google

symptoms, and this sentence quoted should not have been excluded. Then again, in the deposition of Miss Stoner, the court excluded her answer to a question as to what the decedent had told her about giving his property to his two nephews, who came out to Montana to see him. The objection to the question was sustained and the answer was excluded. We think this was an incorrect ruling. Defendants were entitled to the question and the answer. Further along this witness was asked this question, "Now, he said he had given his property to these two nephews in consideration that they were going to give him a home and care for him the balance of his life?" To which the witness answered, "I asked him that and he said, 'Yes.'" Then again this same witness was asked, "What, if anything, did Absalom T. Hays tell you as to having made an agreement with his two nephews that came here relating to giving them his property for taking care of him the balance of his life?" This was objected to as leading and suggestive and the objection sustained. These questions were, to some extent, a repetition of what this witness had previously testified. We think this objection should have been overruled. It is to be remembered that these questions were asked in the deposition and the ground of the objection on which they were excluded apparently is that they were leading. These depositions were taken at the instance of defendants, and plaintiff was represented at the taking of them by counsel. We do not understand that these objections were made at the time the depositions were taken, but appear to have been made when the depositions were presented in order to be read at the trial. We are not able to determine with accuracy as to when these objections were made, but if they were not made at the time the depositions were taken and before they were presented to the court to be read in evidence, they should not have been sustained. Under section 6413, Revised Statutes 1909, the only

Digitized by Google

ground of objection which the court could sustain when the objection was first made in the court, would be to their competency or relevancy. Objections to the form of question must be made at the time the depositions are taken. [Warlick v. Peterson, 58 Mo. 408; Patton v. St. Louis & S. F. R. Co., 87 Mo. 117; Williamson v. Brown, 195 Mo. 313, 93 S. W. 791.]

There is one other assignment of error in the motion for new trial which is also so entirely within the discretion of the trial court that we would be very reluctant to disturb its order granting a new trial, if we understood that it entered into the consideration of the court in sustaining that motion. This assignment is, that the verdict returned is the result of "sympathy, passion and prejudice on the part of the jury." We have no means whatever of determining this on the present, or, generally, on any record. The mere fact that the verdict was for the defendants on the evidence in the case by no means sustains that assignment. But the court presiding at the trial, thoroughly familiar with the proceedings at the trial, the manner of its conduct, the demeanor of the jury and of counsel, is in so much better position to determine on the fact of prejudice and bias, than an appellate court can possibly be, that we would be justified in saying that on this ground, in addition to the ground as to the weight of the evidence, we would feel compelled to sustain the action of the trial court in granting a new trial. On consideration of the whole case, we do not feel warranted in disturbing the action of the circuit court of Pike county in sustaining the motion for a new trial. Its judgment to that effect is affirmed and the cause remanded for further proceedings in due course of law. *Caulfield, J.*, concurs. *Nortoni, J.*, concurs in the result for the reason only that there is substantial evidence in the record in support of the verdict for defendant, and this being true the appellate court is precluded from reviewing the action

Digitized by Google

of the trial court in granting one new trial on the ground that the verdict is against the weight of the evidence.

---

## J. SAM WATTS, Appellant, v. LEVEE DISTRICT NO. 1, MISSISSIPPI COUNTY, MISSOURI, Respondent.

**St. Louis Court of Appeals. Argued and Submitted February 8, 1912. Opinion Filed March 5, 1912.**

1. **ESTOPPEL: Ratification: Difference.** An estoppel is a legal consequence — a right — arising from acts or conduct; while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, i. e., not as yet attended with full legal consequences.

2. **LEVEE DISTRICTS: Status.** A levee district is a public corporation, and its directors are quasi public officers.

3. **———: Estoppel.** Whether an estoppel can be invoked against a levee district, arising from acts of its officers, is a serious question; and, in any event, an estoppel should not be adjudged except on clear and unmistakable proof of acts done by the officers within the line of their powers and duties.

4. **———: Powers of Directors.** The directors of a levee district have no power to impose an obligation on the district, unless first authorized to do so by a vote of the landowners of the district.

5. **———: Payment for Unauthorized Services.** The spirit of our law, as gathered from section 48, article 4 of the Constitution, is against the allowance or payment for public work, or services or labor of any kind performed for a public corporation, such as a levee district, which is done in the first instance without authority of law.

6. **EVIDENCE: Corporations: Admissibility of Parol Evidence to Prove Corporate Acts: Levee Districts.** Parol evidence of corporate acts is admissible, as in the case of natural persons, and while the records are generally conclusive of what actually took place, this is not so when the record is incomplete on its face or when fraud, or the like, appears; and hence, where

Digitized by Google

the minutes of a meeting of the landowners of a levee district contained an entry that one of the directors explained the object and purpose of the meeting, but did not set forth what he stated, parol evidence was admissible to show the nature of the explanation.

7. **LEVEE DISTRICTS: Unauthorized Warrants: Ratification.** In an action on warrants issued by a levee district to pay for a levee, the proceedings for the construction of which had been held invalid by the Supreme Court because authorized at a meeting of a part only of the landowners of the district, evidence *held* not to show a ratification of the issuance of such warrants by the authorization, at a subsequent meeting of the landowners of the entire district, of the construction of a new levee and the repair of the one in question.

8. ———: ———: **Payment from Subsequent Levy.** Warrants drawn in payment for unauthorized work performed in constructing a levee cannot be paid out of funds realized from a tax levy subsequently made to pay for the construction of a new levee and the repair of the old one.

9. ———: ———: **Liability of District: Effect of Prior Decision: Appellate Practice.** A decision by the Supreme Court, in a suit by a county collector to enforce a levee assessment, that the assessment was invalid because the levee was not authorized at a meeting of the landowners of the entire district and the cost thereof assessed against all the land in the district, conclusively establishes that the holder of warrants issued to the contractors, for the payment of which the assessment adjudged to be invalid was made, may not recover against the levee district, in an action on such warrants.

Appeal from Mississippi Circuit Court.—*Hon. Henry C. Riley,* Judge.

AFFIRMED.

*Russell & Deal* for appellants.

(1) The powers of a public corporation are those granted in express words by its charter or the general statutes under which it is incorporated; the powers necessarily or fairly implied in or incident to the powers thus expressly granted; and the powers essential to the declared purposes of the corporation, not only

Digitized by Google

convenient but indispensable. 1 Beach on Public Corporations, sec. 538; 1 Dillon on Municipal Corporations (4 Ed.), sec. 89; 1 Tiedeman on Municipal Corporations, sec. 110. The power granted in express words by the general statutes under which respondent is incorporated is to build levees to protect the lands of the district from overflow or inundation from rivers along its borders. The power necessarily implied in or incident to the powers expressly granted. is to issue warrants in payment of levee constructed. R. S. 1889, chap. 101. Subsequent acts of the Legislature authorized the issuing of warrants and prescribed their form. R. S. 1899, chap. 125, Sec. 8446. (2) A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of the corporate powers but not otherwise. Ratification may frequently be inferred from acquiescence after knowledge of all the material facts, or from acts inconsistent with any other supposition. The same principle is applicable to corporations as to individuals. 1 Dillon on Mun. Corp. (4 Ed.), p. 463; 1 Tiedeman on Mun. Corp., sec. 170; 1 Beach on Public Corp., secs. 248, 249. The most that can be said against the warrants is that they were not properly authorized, and that is questionable. All that the Supreme Court did say in the Wall case was "that the meeting of November 28, 1893, which essayed to authorize the construction of the levee and the assessment to pay for it, was itself without authority and all its acts invalid." Without authority—not properly authorized. Invalid—of no binding force. There is a vast difference, a marked distinction, between the two cases, and the mere dictum of VALLIANT, J., in saying that all of the acts of the meeting of November 28, 1893, were "without authority and invalid" is no authority whatever in this case. The only question before the court in the Wall case was the validity of the assessment, and when it was shown that the assessor had not assessed

Digitized by Google

all of the land in the district, that was sufficient. So, that, it was not really necessary for the court to even pass upon the validity of the meeting of November 28, 1893. (3) If there ever was a case where the doctrine of estoppel should be applied with all of its force this is certainly that case. Two hundred and four out of 247 of the landowners in this corporation in a legally assembled meeting by their vote solemnly declaring to rebuild, strengthen and repair the seventeen miles of levee built with the labor and money of appellant and others, ought to, forever, estop respondent from questioning the validity of a contract which has been wholly executed on the part of the holders of these warrants. Moore v. New York, 73 N. Y. 238; State Board v. Railroad, 47 Ind. 407; Angell & Ames on Corp. (9 Ed.), 240, note a; Railroad v. Howard, 7 Wall 392; Argenti v. San Francisco, 16 Cal. 255; Wood v. Kansas City, 162 Mo. 321; Pinertal v. San Francisco, 21 Cal. 351.

*Boone & Lee* and *W. H. & J. G. Miller* for respondent.

(1) The entire contention of plaintiff is based upon a subsequent ratification by the action of the Crosno meeting of landowners, and the subsequent use, by the district, of the levee built under and in pursuance of the void and illegal action of the Bird's Mill meeting, held seven years prior. Ratification is estoppel, and no question of estoppel can arise when the proceedings are void. 25 Am. and Eng. Ency. Law, p. 576; State ex rel. v. Murphy, 134 Mo. 567. (2) Levee districts in Missouri are political subdivisions of the state, and exercise the prescribed functions of government in the district. Morrison v. Morey, 146 Mo. 543. How can, if at all, a municipal corporation ratify a void act? A ratification must be unequivocal, and with the same degree of solemnity

Digitized by Google

that would be required to make the original contract. Kolmeyer v. Jefferson City, 75 Mo. App. 678; McQuiddy v. Branock, 70 Mo. App. 535; Neil v. Gates, 152 Mo. 585; Clay v. Mexico, 92 Mo. App. 611; Savage v. Springfield, 83 Mo. 323; Gibson v. Zimmerman, 27 Mo. App. 100; Shell City v. Rumsey, 39 Mo. App. 264; Mister v. Kansas City, 18 Mo. App. 217; Unionville v. Martin, 95 Mo. App. 28; Durango v. Pennington, 8 Colo. 257; Nashville v. Hagan, 68 Tenn. 493. (3) A void contract cannot be ratified, and persons dealing with a municipality do so at their peril. If the agent acts contrary to law, the act, so far as it concerns the corporation, is void. 4 Wait's Actions and Defenses, p. 603; Sturgeon v. Hampton, 88 Mo. 213; Hermon on Estoppel, pp. 540, 541; Clay v. Mexico, 92 Mo. App. 611.

STATEMENT.—This is an action to enforce payment of sixteen warrants in the following form:

"OFFICE OF LEVEE DISTRICT NUMBER ONE.
Charleston, Mo.

To the Treasurer of Mississippi County.

Pay out of any money in the treasury belonging to said Levee District, to A. C. Harris———dollars, with interest thereon at the rate of eight per cent per annum, from date of presentation to you for payment until sufficient funds of said district are in the treasury to pay the same.

Done by order of the Board of Directors this ———day of———, 189—.

W. T. MARSHALL, Secretary. THOMAS BECKWITH, President."

The first of the warrants bears date of issue December 15, 1894, the last March 2, 1895. They run in amount from six dollars and seventy cents, the smallest, to one hundred dollars, the largest. They were all protested on presentation to the treasurer of the

Digitized by Google

county for payment, on the ground that there was no money on hand belonging to defendant, the protests being dated from December 17, 1894, to March 4, 1895. They aggregate $743.37, principal, and were all assigned by Harris to plaintiff, who demands judgment on each of them.

The answer, after a general denial, set up the notices and proceedings connected with the issue of these warrants, it being admitted that they were all issued in pursuance of a resolution passed at a meeting of part of the landowners in Levee District No. 1, held at Bird's Mill, November 28, 1893. It was further set up in the answer that these warrants were all issued without authority of law and without authority of defendant, and in pretended payment of certain work not authorized by this defendant; that they were issued under pretended authority of the above named meeting, all the proceedings of which meeting, it is averred, were adjudged illegal and void by the Supreme Court of this state in the case of State ex rel. F. M. Stotts v. Alice and B. J. Wall, a suit brought to collect the tax authorized by that meeting for the payment of the warrants in suit and others of like character, the case referred to being reported 153 Mo. 216, 54 S. W. 465, decided December 22, 1899. Wherefore defendant charges that these instruments are void and constitute no charge against defendant.

The reply, or replication, as it is incorrectly called, after denying all the allegations in the answer, sets out the proceedings leading up to the organization of the levee district, which were had on August 6, 1892, and avers that in pursuance of apparent authority given to them by the landowners of the district prior to May 17, 1900, the board of directors had constructed about seventeen miles of levee and issued warrants aggregating $62,115, in payment for that work, these warrants including those sued on, and had caused a tax to be levied upon the lands in the district for the

Digitized by Google

purpose of paying the warrants, and had paid, after the issue of the warrants, about $40,000 thereof. It is further set up in the reply that on December 8, 1899, after the decision in the Stotts-Wall case, above referred to, by the Supreme Court, and with full knowledge of the contents of that decision, the board of directors of the levee district had met and, as provided by law, determined and ordered that the levee should be built around and along the river front of the levee district from the New Madrid county line in the Mississippi river northward along the river to the north end of the levee district extending along the north end of Big Lake to the "Still House," including the seventeen miles of levee theretofore built, and for the payment of which the warrants sued on were issued; that at that meeting the board had ordered "that accurate surveys, maps and profiles of said levee to be constructed, and repairs to be made," be furnished and that estimates and calculations of the cost of that work be made showing the amount, character and kind of work to be done, the exact location and probable cost thereof, and appointed a competent civil engineer to do the work; that afterwards, on May 7, 1900, the board of directors of the levee district met and by resolution ordered the assessment of a tax on all lands within the levee district to be benefited, "for the purpose of defraying the expenses of surveys, and estimates of levees or other work and the cost thereof, maintain the same and pay such officers, agents, servants and employees as are allowed compensation by law," the board also ordering that a certified copy of the resolution be transmitted to the clerk of the county court of the county; that in accordance with this resolution the tax so levied was extended on the tax books of the county on the real estate to be benefited by the proposed work, and had been so extended and collected from year to year as other taxes; that the county assessor filed the assessment books of the district with

Digitized by Google

the clerk of the county court and a copy thereof with the president of the board of directors of the district; that the civil engineer filed his report and estimates with the board of directors of the district; that afterwards, the board of directors called a meeting of the landowners in the district, to be held June 21, 1900, at a place designated on the line of the proposed levee work, and caused notice of the meeting to be published and posted as required by law; that pursuant to that resolution and notice a meeting of the landowners in the district was held at the place and on the date designated, at which meeting the report, specifications, surveys, maps, profiles and estimates as made by the engineer, "which included the seventeen miles of levee theretofore built for the payment of which the warrants herein sued on were issued, was submitted, together with the assessment as returned by the county assessor to the meeting of said landowners for their ratification or rejection, and that at said meeting it was then and there determined by a majority of the landowners of the district present to do the work according to the report, specifications, surveys and profiles submitted by the engineer of said district." It is further averred that since that meeting of July 21, 1900, the board of directors of the district has expended large sums of money in building levee and repairing and strengthening the seventeen miles of levee which had been built "and is exercising ownership and control of all levee built and paid for with the warrants herein sued on." It is further averred in the reply that all the acts and proceedings of the board of directors and landowners of the district were done and had with full knowledge that a large amount of levee had been constructed and that warrants issued in payment for this work were outstanding and unpaid; that all work for which the warrants had been issued was done in good faith by the several contractors and the warrants were issued by the board of directors

Digitized by Google

and received by the contractors in good faith, and that the defendant district has received and is yet receiving great benefits from the work for the payment of which the warrants were issued, wherefore it is averred that by reason of the premises the defendant levee district has fully ratified and confirmed the action of the board of directors in issuing the warrants and is now estopped by reason of the premises aforesaid to deny the validity of the warrants.

The trial was before the court, a jury having been waived. It was admitted that the district was legally organized; that the warrants sued on were issued by order of the board of directors of the defendant district and were signed by the proper officers of the district; that plaintiff is the owner of the warrants; that they were due (had matured) and were unpaid at the time the suit was filed; that they were issued in part payment of work and labor performed in the construction of about seventeen miles of levee, as alleged in the reply; that they were all presented to the county treasurer of the county and protested by him on the several dates mentioned. One of the warrants for one hundred dollars was introduced as a sample of all the warrants save as to the amount, date, number and date of protest. These facts were agreed to as constituting plaintiff's evidence in chief.

It was also agreed that all these warrants were issued in pursuance of a resolution passed at a meeting of part of the landowners in District No. 1, held Nov. 28, 1893. The petition in the case of State ex rel. Stotts, Collector v. Wall et al., above referred to, was in evidence and it was admitted that that suit was for taxes levied by the board of directors of the levee district for the purpose of paying the warrants in suit, and other warrants of like character, all issued in pursuance of the meeting of landowners held November 28, 1893. The judgment of the Mississippi County Circuit Court in the Stotts-Wall case, in favor of plaintiff,

Digitized by Google

the affidavit for appeal in that case and the opinion of the Supreme Court were in evidence, these all being offered and admitted subject to plaintiff's objection that he was not a party to that suit; that it was a suit to recover taxes and not on any warrant by the levee district. Defendant also introduced the notice to the landowners in the levee district, of date October 27, 1893, by which it appeared that the district specified was less than the whole levee district. It also introduced the proceedings of the board at the landowners' meeting of November 28, 1893.

In rebuttal plaintiff introduced all the records of the meetings of the board and the landowners in the district, had prior to 1899, connected with the building of the seventeen miles of levee. Plaintiff also introduced the record of the meetings of the board of directors, commencing with the meeting of December 8, 1899, at which latter meeting a resolution was adopted that "a levee shall be built around and along the river front of said levee district from the New Madrid county line in the Mississippi river northward along the north bank of Big Lake to the Still House; and it is further ordered and determined that the levee heretofore built shall be strengthened, that such levee and such repairs are necessary to protect the district from inundation and overflow from rivers, and it is determined by the board that for the protection of said levee district from overflow and inundation from rivers it is necessary to construct a levee and strengthen and repair the old levee as above set forth." The resolution further ordered that accurate surveys, maps and profiles "of said levee to be constructed and repairs to be made" be furnished and that estimates and calculations of the cost of the work, showing the amount and character of the work to be done and its exact location and probable cost, be made, and it was ordered that an engineer named should be employed to do the work. An order of the levee board, of date May 12, 1900, was also in

Digitized by Google

evidence, reciting that the board had determined, "that by the levee and work now proposed to be done," all the lands in the district would be benefited, and the board resolved, "that in order to defray the expenses of surveys, estimates of levee to be built and cost thereof, and to pay the officers, agents, servants and employees of said levee district," that an assessment of a tax on all the lands in the boundaries of the district shall be levied and extended on the assessor's book, specifying the rate. The plans, specifications, etc., and estimates of the engineer in evidence, it is stated, show that the engineer "included in his work all of the levee constructed by means of the warrants sued on, and other outstanding warrants." A copy of the assessment books made by the assessor having been returned by the clerk of the county court, the board ordered a meeting of the landowners in the district to be called, to be held on July 21, 1900, at a point in the district named, notice of the time, place and object of the meeting being ordered to be published. The notice to all the landowners in the district set out that on Saturday, July 21, 1900, a meeting would be held for the purpose of submitting for action thereon, the reports, specifications, surveys, maps, profiles and estimates, made by the engineers, and assessments returned by the assessor, the landowners being notified to appear and show cause, if any they had, why the land should not be assessed for such an amount "as would be necessary to pay for the work," and that a vote would be taken whether the proposed work should be done in the district. Following this is the record showing the proceedings of the meeting of the landowners in the levee district. It appears by this that at that meeting a chairman and secretary were selected, the publication of notice of the meeting made, noted as filed, and it is set out that "the object and purpose of the meeting were explained to the land-



Digitized by Google

owners present by F. J. Hess on behalf of the board of directors, who asked specific instructions from the meeting." Following this is the entry that the board of directors being present, submitted the reports, the assessments and profiles, all of which were laid before the meeting, the estimates showing that the probable cost of the levee would be $262,784, and giving the estimate of the necessary assessment, it was stated that the question before the meeting was, "whether said levee should be built and the said forty per centum be assessed against said lands to build said levee." The record then sets out the appointment of tellers, the number of votes in favor being 204, those against forty-three. Whereupon the chairman announced that the proposition carried "and the meeting determined to build said levee." It is further set out in these minutes of this meeting that the original copy of the proofs of publication and affidavit of posting notices and original record of the names of voters voting, showing the vote of each, was attached to the proceedings, and the proceedings ordered filed with the secretary of the board of directors. This is all that appears in this record of the proceedings of the meeting. Following this, under date of August 24, 1900, and down to February 7, 1903, are records showing the proceedings of the board in carrying out the plan, and assessments from year to year under the resolution of July 21, 1900. No record entry, however, of any kind appears with reference to the payment of the warrants issued for the first levee, nor is there any record in the minutes of the board in evidence showing any action on these old warrants or any reference to payment for the work previously done on the seventeen miles of old levee.

F. J. Hess, called as a witness on behalf of plaintiff, testified that he is the present secretary of the levee board and is acquainted with the first levee built by the district, which began on the Clarkson

Digitized by Google

property on Big Lake, known as the "Still House," and extends east and south to Bird's Point; that very little of it was built below Bird's Point prior to the decision of the Supreme Court in Stotts v. Wall, supra, none of it being built by the levee board below Bird's Point before 1899. The acts of ownership exercised by the levee district over the first seventeen miles of the levee, built prior to 1899, consisted in the appointment of inspectors to look after and preserve the levee; that it is exercising the same control and acts of ownership over that part of it that it is over the remainder. The plans and estimates submitted to the landowners at the meeting of July 21, 1900, showed the location of the levee and it was then and there determined to build the levee in accordance with the plans and specifications submitted there that day.

W. T. Marshall, examined as a witness on the part of plaintiff, testified that he was a member of the first board of directors of the levee board and acted in that capacity for four or five years; knew the seventeen mile stretch of levee first built. The warrants issued in payment for that work were issued in good faith to, and received by, the contractors who constructed that work. It had been a great deal of benefit to the north end of the district, keeping the overflow from the Mississippi river entirely off that end of the district and largely reducing the water in other portions of the district. He testified that it was hard to estimate the benefit to the district accruing from this levee; had saved several crops; it was the logical place to commence the construction of the levee and it was continued from there on down the river. On cross-examination Mr. Marshall testified that this original seventeen miles of levee from the "Still House" was built in pursuance of the resolution adopted at the meeting held by the landowners of a part of the district in November, 1893. That was the only meeting any of the landowners of the district held prior to that of 1900. Witness was

Digitized by Google

present at the meeting held November 28, 1893, at Bird's Mill, and testified that the only persons who voted at that meeting were those embraced in the territory described in the notice of that meeting.

Mr. Hess, recalled by defendant, testified that he was at the meeting of the landowners held July 21, 1911; it was held at Crosno. Witness being asked to state if anything was said to the several landowners with reference to the payment or levying of taxes for the payment of outstanding warrants to build the old levee, that is the levee built under the order or resolution of the Bird's Mill meeting, held in November, 1903, the question was objected to by counsel for plaintiff on the ground that the record of the meeting "speaks for itself;" that it was a meeting provided for by law and the record of the proceedings was kept. The objection was overruled, plaintiff excepting, and witness answered that there was. Asked to state what was the understanding had at that meeting with reference to payment of these warrants, witness stated that when they met there, Mr. Huff, one of the directors, called Mr. Barry and witness, the three of them being the directors, off to one side. There was opposition to the proposition, several landowners making considerable fight against it. Mr. Huff called the other two directors to one side and told them the condition of affairs; said he "had been canvassing the condition and if we didn't do something the proposition would be lost." Whereupon all three of the directors agreed that they would not pay these old warrants; they did not consider them legal obligations against the district and would not pay them, and he (Huff) assured the landowners present that he would resign before he would have anything to do with them. Witness Hess explained the object of the meeting at the request of the president of the board, and some one of the landowners in the meeting made him state what the levee board promised the people; that they

Digitized by Google

did not consider these warrants legal obligations and could not and would not pay them. This was all objected to by plaintiff's counsel for the reason before stated. On cross-examination Mr. Hess testified that the proposition submitted to the landowners' meeting of July 21, 1900, was whether or not they would determine to do the work in accordance with the plans, specifications, estimates and profiles as submitted there that day, those being the ones prepared by the engineer appointed by the board. That proposition carried. All three of the members of the board of directors were present and Mr. Huff called them together and said if they "didn't let the people know something definite" about what they were going to do about paying the warrants, "that the proposition would be voted down." Witness himself told Mr. Huff that he (witness) represented a good many proxies and would vote against the proposition if the money was used to pay for that work; that the attorney of the board had advised the board, and the members of the board told the people at the meeting, that the warrants were void; to consider them void, and that the board obligated themselves as men that they would have nothing to do with them, and that is the reason the board of directors now refuse to pay the warrants. Witness further testified that of course the levee district "is now getting the benefit of such work as is there now and will continue to do so if they put out a whole lot of money on repairs;" that a lot of money is needed. No resolution was passed that day that witness knew of that they would not pay the warrants.

Mr. Huff, called as a witness for defendants, stated that he was a member of the board and present at the meeting at Crosno. There was an announcement made to the landowners assembled there, before they voted to build the levee, concerning the outstanding warrants which had been issued for the payment of the old levee, built in pursuance of the resolution

Digitized by Google

adopted at the Bird's Mill meeting in 1893. A number of the landowners present came to witness and asked him what the board was going to do if the landowners voted that one hundred thousand dollars, and if the board would use it in paying off the old indebtedness. Witness told them that he was not in favor of it; that he had paid his own taxes and "did not feel like paying somebody's else's taxes." These people said that if these warrants were to be paid, they would vote the proposition down and they wanted an understanding about that, whereupon witness talked to Messrs. Hess and Barry, the other members and they agreed to what the board would do. Mr. Hess made a statement to the meeting of the conclusion arrived at by the board. A number of the landowners present made it understood that if there was to be a payment of the old warrants issued on the authority of the Bird's Mill meeting, they would not vote for this proposed levy. This was all objected to by counsel for plaintiff for the reasons before stated, the objection overruled and exception saved. Witness identified a map of the county showing the levee district. He stated that a part of the levee was built in 1856 and only repaired by the levee board; some parts of it were never touched. On cross-examination witness stated that it was his understanding that the objections to the payment of the warrants came almost entirely from the people in the south end of the district, who opposed all the money being used in the upper end of the district.

Mr. Ashby, sheriff of the county in 1900, and a landowner in the levee district, testified that he attended the meeting of the landowners held in 1900 for the purpose of building a levee. Mr. Hess announced to the meeting that he did not think the warrants issued in 1893 and 1894 were valid and that the board would not pay them—something to that effect. Several of the landowners present were making quite a

Digitized by Google

fight against the proposition. They talked the matter over and Mr. Hess then made the announcement that so far as the board was concerned they did not consider the warrants valid. On cross-examination witness stated that the objections came from the north as well as the lower end of the county. They objected to paying the taxes when the levee was built, and people from the lower end of the county objected because they wanted the money expended for a new levee. The announcement was made by Mr. Hess in order to carry the proposition as submitted in the notice.

Mr. Marshall, recalled on behalf of plaintiff, testified that he was chairman of the landowners' meeting held at Crosno and had never heard of any public announcement being made, that the outstanding warrants would not be paid; as chairman would have known if any motion of, or if any action had been taken at that meeting on it, and the secretary would have recorded it. The record shows everything that was done there; heard nothing of any direct ratification of the old warrants and heard nothing said about them.

Mr. Ashby, recalled, testified that he did not mean to state that the payment or non-payment of the old warrants was discussed at the landowners' meeting at Crosno after the meeting was organized; it was discussed by those at the meeting but before it was called to order. To the best of witness's recollection Mr. Hess made the statement before the meeting was called to order but made it in a public way. After the meeting was convened and in order, witness did not hear anything said about the payment or non-payment of the warrants; what was said was before that and they thought the proposition would be defeated. On cross-examination witness testified that he remembered a Mr. Campbell calling to Mr. Hess and asking him what he was going to do about the old warrants; that was before the meeting was called to order and it was when Mr. Hess stated the object of the meeting.

Digitized by Google

At the conclusion of the testimony in the case plaintiff asked an instruction to the effect that although the court, sitting as a jury, might believe and find from the evidence that the warrants sued on were issued by the board of directors of the defendant district pursuant to the proceedings of the landowners at the Bird's Mill meeting of November, 1893, and that the notice of that meeting was defective or insufficient in law, still if the court sitting as a jury, believed and found from the evidence that the warrants were issued after that meeting in payment of work performed in the construction of a levee to protect the land in the district from overflow and that afterwards the county court caused all the land in the district subject to overflow and to be benefited to be assessed as required by law, and that the board of directors of the district levied a tax on all such land to defray the expenses of surveys, estimates for levees or other work and costs thereof, and ordered surveys, maps and profiles made and employed an engineer for that purpose and ordered a levee built around and along the district from the New Madrid county line northward along the river to the north end of the levee district and extending along the north bank of Big Lake to the "Still House," and ordered that the levee heretofore built be strengthened and repaired, and called a meeting of the landowners of the defendant district and gave proper notice thereof, and that at that meeting the landowners of the district present or represented, after the reports, etc., made by the engineer together with the assessments as returned by the county assessor, had been submitted to them determined by a majority vote to build the levee according to the report, surveys, estimates, etc., "then in that event such proceedings by the board of directors and the landowners at said meeting was a ratification of the acts of the board of directors in issuing the warrants sued on and the verdict must be for the plaintiff on each count of the petition,

Digitized by Google

except on those counts where the warrants were more than ten years old before suit was filed." The court refused this instruction, plaintiff excepting, and judgment followed in favor of defendant on all counts in the petition. Filing a motion for new trial and excepting to that being overruled, plaintiff duly perfected appeal to the Supreme Court. The case pending in the Supreme Court, that tribunal ordered its transfer to this court, it appearing that the amount in controversy was not within the jurisdiction of the Supreme Court, and that court having determined in Wilson v. King's Lake Drainage & Levee District, 237 Mo. 39, 139 S. W. 136, the opinion in the cause handed down July 15, 1911, that a drainage district is not a political subdivision of the state within section 12, article 6, of the Constitution, there was no question in the case within the jurisdiction of the Supreme Court.

REYNOLDS, P. J. (after stating the facts).—The facts connected with the issue of these warrants are so fully set forth in the opinion by Judge VALLIANT in State ex rel. Stotts v. Wall, supra, that it is unnecessary to go into them.

Before considering whether these warrants are void, let us see if there are here present such acts of ratification or acquiescence by the corporation as raise an estoppel, conceding for the argument, but not conceding it as a fact, that the proceedings under which the warrants, of which the ones in suit are a part, were issued, were merely invalid and not void. "An estoppel is a legal consequence—a right—arising from acts or conduct; while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, i. e., not as yet attended with full legal consequences." [Bigelow on Estoppel (5 Ed.), p. 457.] Let us consider whether there has been an express ratification.

Digitized by Google

Whether an estoppel can be invoked as against this levee district, arising from the acts of its officers, is a very serious question. The directors of this district are public officers and the district itself a public corporation; although, as held by the Supreme Court in Wilson v. King's Lake Drainage & Levee District, supra, and cases there cited, the levee districts are not political subdivisions of the state but public, governmental agencies and in no sense private corporations. Certainly no estoppel should be adjudged against them but on clear and unmistakable proof of acts of ratification and acquiescence, done within the line of their powers and duties. The directors of these levee districts have no power to impose any obligations on the district unless first authorized to do so by vote of the landowners of the district. They are quasi public officers, officers of "a public governmental corporation." Our Constitution, section 48, article 4, provides that the General Assembly itself, the supreme lawmaking power of the state, shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation to a public officer, agent, servant or contractor, "after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay, nor authorize the payment of any claim hereafter credited against the state or any county or municipality of the state under any agreement or contract made without express authority of law and all such unauthorized agreements or contracts shall be null and void." While this constitutional prohibition does not literally cover the class of officers or public agencies to which these drainage districts belong, it would seem that its spirit should cover them, and that spirit is against the allowance or payment for public work, services or labor of any kind done in the first instance without authority of law, as was the case here.

Digitized by Google

There is very positive evidence that at the Crosno meeting, that is, the meeting held in July, 1900, certainly immediately prior to that meeting being called to order, or at least in the act of calling it to order, the members of the board of directors becoming anxious about a favorable vote, distinctly gave notice, through Mr. Hess, one of their number, that the contemplated action on voting for the levee along the whole line of the county and including the whole district, was not to be considered as ratifying the warrants which had previously been issued for the seventeen-mile part of the levee in the north end of the county and that none of the money authorized to be raised by the action of this meeting was to be applied in payment of those warrants. It is true that no minute was made in the records of this meeting of what Mr. Hess then said, but the record of that meeting contains this entry: "The object and purpose of the meeting were explained to the landowners present by F. J. Hess on behalf of the board of directors, who asked specific instructions from the meeting." What Mr. Hess then said is not recorded; it is not usual to do that; but he and others have testified to what he said, as we have seen. This testimony, so far from contradicting, supported what the minutes affirmatively show. Moreover, it has been determined in many cases that parol evidence of corporate acts is admissible, as in the case of natural persons, and while the records are generally conclusive of what actually took place, this rule does not apply when the record on its face shows its incompleteness. Nor are they conclusive when fraud, or the like appears. [Davis Mill Co. v. Bennett, 39 Mo. App. 460, l. c. 464. See, also, Preston v. Mo. & Penna. Lead Co., 51 Mo. 43, and cases cited, page 46.] We hold that this evidence, in view of the obviously incomplete entry of what Mr. Hess did state, was admitted properly over the objection of plaintiff, and it tends to prove that the matter of

Digitized by Google

these warrants was brought up at that meeting and that it was distinctly understood that the adoption of the proposition submitted by the board of directors at the meeting of 1900 was not in any way whatever to be held to bind the landowners of the district to the payment of the warrants that had been theretofore issued for the construction of the seventeen-mile piece of levee.

Apart from that, however, the proposition submitted, which was adopted by the resolution of a decided majority of the landowners there present and voting, contains intrinsic evidence of the fact that there was no ratification whatever of the action of part of the landowners of the district at the meeting held in November, 1893, in authorizing a tax to pay for the old levee. The proposition itself, as submitted, was for the construction of a levee "from the New Madrid county line in the Mississippi river northward along the north bank of Big Lake to the Still House; and it is further ordered and determined *that the levee heretofore built shall be strengthened,* . . . and that it is necessary to construct *a levee and strengthen and repair the old levee as above set forth.*" The proposition submitted to the landowners in the form of a resolution was "that in order to defray the expenses of surveys, estimates of levees *to be built and cost thereof,* and to pay the officers, agents, servants and employees of said levee district, we do hereby order the assessment of a tax," etc. In the notice to the landowners, after describing the line of the levee as taking in the whole east and north sides of the county, they were notified to appear at the meeting of July, 1900, to show cause if any they had why the land should not be assessed with their proportionate part of the cost of said work and an estimate of the probable cost of the work and of the amount of assessment "*as will be necessary to pay for said work,*" would be made known to the landowners present, "and a vote

Digitized by Google

will be taken *whether the proposed work shall be done* in said district as above described." The report and estimate of the engineer and the assessment of the assessor, "were laid before the landowners present, showing that the probable cost of the levee would be $262,784 and that the probable rate per centum therefor on the valuation of said lands as increased by said work would be forty per centum. and the proposition was then submitted to the landowners in said district benefited by the work present in person or by agent or attorney *whether said work should be done, whether said levee should be built and the said forty per centum be assessed against said lands to build said levee.*" This was the proposition submitted, voted on and adopted.

It would be hard to use words that more clearly indicated that the proposed tax was to pay "for work thereafter to be done;" to "thereafter construct a levee;" to "repair the old levee." No one reading the resolution as adopted could by any possibility have supposed that authorization for payment of work theretofore done was contemplated. In the estimate submitted, when the old levee is referred to, the language used is, that the estimate submitted and the ratification which is asked of the landowners, embraces the cost, not of the *building* of the original seventeen miles, but "that a levee *shall be* built around and along the river front of said levee district from the New Madrid county line in the Mississippi river northward along the north bank of Big Lake to the Still House; and it is further ordered and determined *that the levee heretofore built shall be strengthened,* that such levee and such repairs are necessary to protect the district from inundation and overflow from rivers; . . . that it is necessary to construct a levee *and strengthen and repair the old levee* as above set forth." Counsel for appellant themselves say in their reply brief: "Bear in mind that seventeen miles of this same levee which

Digitized by Google

the board was ordering built at this time, had been constructed and paid for by the warrants in suit and others of similar import. Notwithstanding this levee had been built, the board of directors ordered it built again and submitted that proposition to the landowners at the Crosno meeting and they decided to build it and voted a tax for that purpose." But none of the warrants here involved were for rebuilding the old levee; the expenditures authorized were to repair that, not to pay for the old work but to pay for new work. It therefore is very clear that all that was contemplated in connection with the old levee was to repair and strengthen it, if necessary even rebuild it; not a word is used looking to payment for work before then done in building the old levee. There was a distinct declaration that the fund derived from the taxation to be ordered and to be levied under the action of the landowners of the district had in 1900, was solely for payment of work thereafter to be done. Hence we find there was no express ratification of the issue of these warrants.

But it is said that an estoppel has arisen by the act of the directors in using the old levee or in repairing it, and that the district is estopped by that from refusing payment of these warrants.

There is testimony to the effect that this part of the levee constructed under the vote of 1893 is in use and has been repaired. For that matter, it may be noted that there is testimony that parts of a levee constructed in 1854 and afterwards are also in use. That the seventeen miles built under the orders of 1893 were there, is certain. What were the people of the district to do with it? Were they to tear it down and start over? Were they to refuse to repair it as needed? In short, unless these public officers of the district, or the public, the landowners who constituted the district, were to abandon this levee entirely, were they to pay for its construction? We do not consider

Digitized by Google

it necessary to here pass on that. The question here is as to payment of these warrants, and as to whether the district can, in this action, be required to pay them, to pay these warrants drawn without authority of law and for this old unauthorized work. In the Wall case the Supreme Court had before it the question of the validity of the assessment and levy of taxes from which to pay these warrants. It was there held that a tax assessment could not be laid unless authorized by a meeting of the whole district, and when an assessment is laid it must cover all the lands in the district; that in the case then before the court, the board of directors had undertaken to say that some lands in the district would be improved and some not and they undertook to divide the district, notifying only the landowners of a part of the district, and giving protection to the part they thought needed it and leaving unprotected the part they thought did not need it, and imposing an assessment on a part to the exemption of the rest, and the court said (l. c. 221): "The board of directors have no such power, nor can the county court confer that power on them, nor would it change the case if their action was prompted by an understanding on their part that the landowners in the portion of the district left out did not wish to come in. While the district remains as the county court organized it, it is a unit that no one else can devide." And further, at page 223, the court held: "It is only in a meeting to which all the landowners in the district are called, with the notice and in the manner prescribed in section 6681 (R. S. 1889), that authority to build a levee and lay an assessment to meet the cost can be given, and even in such meeting the assessment cannot be partial; it must cover all the lands in the district, or it will be binding on none. It follows from the foregoing interpretation of the provisions of chapter 101, Revised Statutes 1889, that the meeting of November 28, 1893, which essayed to

Digitized by Google

authorize the construction of the levee and the assessment to pay for it was itself without authority and all its acts invalid."

It is contended by the learned counsel for appellant in this case, that that decision is neither between the same parties nor does it declare these warrants void, and that the remarks of Judge VALLIANT, who delivered the opinion, that all the acts of the meeting of November 28, 1893, were "without authority and invalid," are mere *dicta*. It is true that that case was not between these same parties and that it arose, not on the payment of the warrants but on the validity of an assessment of taxes to raise funds with which to pay the warrants. But we do not consider these words of Judge VALLIANT mere *dicta*, and the opinion does declare the law for us and is conclusively binding upon us in determining that the meeting of a portion of the landowners in the district, held in 1893, was not such a meeting as provided for by law; that all its proceedings were invalid, and that the assessment levied to pay warrants, issued for that work, was invalid. It is difficult to escape the conclusion that invalid as here used means void, although it is true that the two words are not always synonymous. But it is clear that by this decision, as is said by our Supreme Court in Wilson v. King's Lake Drainage & Levee District, supra, when referring to the decision of the court in King's Lake Drainage & Levee District v. Jamison, 176 Mo. 557, 75 S. W. 679, that the proceedings before had in the creation of the district and levy of the tax were "torn up root and branch. . . . With that opinion the contracts made and the warrants issued by the old board fell to the ground." Our Supreme Court, in the Stotts-Wall case, certainly has announced that in consequence of the invalidity of the proceedings of the meeting of 1893, no tax levy can be made or enforced in payment of these warrants. The validity of these warrants de-

Digitized by Google

pends on the validity of the proceedings of the meeting by which their issue was ordered. Those proceedings falling, these warrants fall. If we were now to say that the funds arising under the levies made by authority of the proceedings of July, 1900, can be reached or, more properly speaking, that these warrants can be merged into a judgment, to be enforced against the only fund which this board of levee commissioners has at its disposal, namely the funds derived from the assessment and levy authorized by the meeting of July, 1900, we would virtually be overturning the decision of the Supreme Court in the above case, a thing we cannot do. That court has there specifically held, and as applying to the tax levied or ordered to be levied in October, 1893, for the construction of this seventeen miles of levee, that no tax levy can be made for that purpose because the proceedings authorizing it were invalid. As before noted, as said in the Wilson case, supra, of another case, the Stotts-Wall decision tore up and destroyed, root and branch, all of the proceedings held for the construction of the seventeen miles of levee. We cannot escape the conviction that destroying or holding invalid the proceedings under which the warrants were issued, destroyed, made void, warrants, and we so hold.

Furthermore, and as a reason why this action on these warrants cannot be maintained, it is to be remembered that there is no pretense that there is any fund at hand or at the disposition of defendant, arising from that previous tax levy. The only funds now available are the funds arising from the tax assessment and levy authorized by the meeting of July, 1900. Clearly, therefore, unless we are to overturn the decision of the Supreme Court in the Wall case, we cannot require these warrants to be paid out of any part of the tax levy authorized by the meeting of July 21, 1900, and to be used in payment of work



Digitized by Google

thereafter to be done. To sustain a judgment here for plaintiff, we would in effect be doing that.

Whether the levee district is liable to pay for that part of the levee which was built under the authorization of 1893, by reason of acceptance of all of it, is not before us. This, unlike the Wilson case, is an action on these invalid warrants. Whether an action can be successfully maintained for the work and labor done in the construction of this seventeen miles of levee (see Louisiana v. Wood, 102 U. S. 294), is not now before us. It is beyond question that these warrants, drawn in payment against the tax authorized by the district in July, 1900, cannot be paid out of the tax levee authorized under the action then taken and the resolution then adopted. None of that fund can be diverted to the payment of work before then done, nor can payment of these warrants, as warrants, be enforced against this district.

We think the learned trial court committed no error in refusing the declaration of law asked for plaintiff and that its conclusion upon the facts in the case, under the evidence in the case, is not only sustained by the evidence in the case but is a correct conclusion of the law under that evidence. The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

Digitized by Google

# W. P. HEDGE, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

**St. Louis Court of Appeals. Argued and Submitted February 8, 1912. Opinion Filed March 5, 1912.**

1. **RAILROADS: Action for Assault: Instructions: Failure to Submit Authority of Agent Committing Assault: Nondirection.** In an action against a railroad company for an assault committed by an employee, the defects in an instruction, in so far as it specifically failed to set out the duties of the employee and to specifically charge as to what acts it was necessary to find as evidence of the fact that he was an agent of the defendant, charged with the enforcement of its rules in and about the station where the assault was committed, are matters of nondirection, and are not ground for reversal.

2. **DAMAGES: Assault: Punitive and Compensatory Damages: Excessive Verdict: Railroads.** Where an employee of a railroad company made a brutal and unwarranted attack on a person who was at the station to purchase a ticket to board a train, a verdict of $500 actual and $2500 punitive damages was not excessive.

3. **RAILROADS: Action for Assault: Liability for Acts of Agent.** An employee of a railroad company, charged with the duty of enforcing the company's rules in and about a station, was a special policeman, but he did not receive any compensation from the municipality for his services and never did any duty as policeman except at the station. The company paid him for services rendered. *Held*, that the company was liable for an assault committed by him on a person coming to the station for the purpose of purchasing a ticket to take a train, and that it could not escape liability on the theory that what the employee did he did as a policeman and not as an employee.

4. ———: ———: ———. An employee of a railroad company inspecting and repairing engines moving through a town was frequently at the depot, and discharged the duties of watchman with knowledge of the local agent and officers of the company. The company paid him for his services. *Held*, that the company was liable for an assault committed by him while discharging the duties of watchman.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

AFFIRMED.

Digitized by Google

*E. T. Miller, Moses Whybark* and *A. P. Stewart* for appellant; *W. F. Evans* of counsel.

(1) The peremptory instruction asked by defendant at the close of all the evidence should have been given. The act of the servant for which the master was held liable was not an act within the scope of the servant's employment, in the line of his duty, and relating to the duties of his employment. Hartman v. Muehlbach, 64 Mo. App. 565; Howard v. Railroad, 110 Mo. App. 574; Dickey v. Dickey, 111 Mo. App. 304; Long v. Nute, 123 Mo. App. 204; Cousins v. Railroad, 66 Mo. 572; Milton v. Railroad, 193 Mo. 46; Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590; Railroad v. Keely, 177 Fed. 189; McKain v. Railroad, 64 S. E. 18, 23 L. R. A. (N. S.) 289; Railroad v. Ponder, 60 L. R. A. 713; 2 Woods Railway Law, sec. 1212; 3 Elliott on Railroads, sec. 1265. (2) The court erred in giving plaintiff's instruction number 1. This instruction made the jury the judges of the law as well as of the facts. The court should have stated the law and left to the jury only questions of facts for their consideration. The instruction was further erroneous in that its tendency was to mislead and confuse the jury. Allen v. Transit Co., 183 Mo. 411; Neff v. Cameron, 213 Mo. 350; Ayers v. Railroad, 124 Mo. App. 422; Harrison v. Franklin, 126 Mo. App. 366; State ex rel. v. Allen, 132 Mo. App. 98. (3) The court erred in giving plaintiff's instruction number 2. The instruction is misleading and is calculated to, and did evidently, mislead the jury. See authorities cited under point 1. (4) The court erred in giving plaintiff's instruction number 3. This instruction also permitted the jury to construct its own standard as to what constituted a cause or excuse for the alleged act of defendant Brownfield. See authorities cited under point 1. (5) The verdict is excessive and bears no relation to the injuries sustained. It is also grossly excessive in respect of punitive damages.

Digitized by Google

*Ward & Collins* for respondent.

(1) Brownfield was the servant of appellant; it selected him, it paid him, it controlled him, it prescribed his duties, and these duties pertained to their property and interests, and he was subject to discharge by it. Hence, by every recognized and controling test and definition, the relation of master and servant existed. Phillips v. Mfg. Co., 129 Mo. App. 396; Bishop on Non-Contract Law, sec. 599; Wood's Master and Servant, secs. 1, 317, and note 1; Cooley on Torts, 531; 1 Parsons on Contracts 101; 1 Lawson's Right, Remedies and Practice, sec. 294; Mound City, etc., Co. v. Conlon, 92 Mo. 221; Brill v. Eddy, 115 Mo. 596. (2) The acts complained of were within the scope of the employment of Brownfield as the servant of appellant, and in the line of his prescribed duties while he was about his master's business and furthering his master's ends, and, hence, the rule of *respondeat superior* would apply. Whether the master directly authorized the act or not, or was or was not privy thereto, if it placed its agent or servant in a place to do a certain class of acts or accomplish a certain end it is responsible for the means and methods and discretion of the servant employed and used to accomplish the expected results. Appellant set in motion the agency that produced the mischief and is liable. Garretzer v. Duenckel, 50 Mo. 104; Wood on Master and Servant, p. 561; Whitehead v. Railroad, 99 Mo. 270; Harriman v. Stowe, 57 Mo. 98; Morgan v. Bowman, 22 Mo. 538; Douglas v. Stephens, 18 Mo. 362; Minter v. Railroad, 41 Mo. 503. (3) The contention of appellant that Brownfield was a special policeman does not militate against respondent's right of recovery, because a police officer may be a civil agent. Gerhardt v. Savings Institution, 38 Mo. 60; Daily v. Bank, 56 Mo. 102; Wood on Master and Servant, p. 542; Wood on Master and Servant, sec. 459, p. 553;

Digitized by Google

1 Am. and Eng. Railroad Cases, 571. (4) Instructions given on behalf of respondent are well enough, based upon the evidence adduced at the trial, and fairly and properly declare the law of the case. Such instructions have repeatedly met the approval of the appellate courts of this state. Tangner v. Railroad, 85 Mo. App. 28; Sonnen v. Trans. Co., 102 Mo. App. 271; O'Donnell v. Trans. Co., 107 Mo. App. 34.

STATEMENT.—Plaintiff, an old man about seventy-two years of age and in rather feeble health, weighing a little under a hundred pounds, about two o'clock on the morning of the 17th of December, 1909, started for the station of defendant railroad company at Hayti, in Pemiscot county, for the purpose of purchasing a ticket, intending to go as a passenger on the train of defendant from Hayti to Caruthersville, the train being due to leave Hayti a few minutes after four o'clock that morning. Upon reaching the vicinity of the station, he did not go into it immediately but going across the railroad track of defendant, went into a restaurant, where he remained for a short time. From the restaurant he went out to a closet situated on the railroad Y, and while returning from the closet and walking along the Y, he was accosted by defendant Brownfield, a young man about twenty-nine years old and weighing about 190 pounds, and something over six feet high.

According to plaintiff's testimony, as he came out of the closet and was walking along the track. he saw defendant Brownfield coming along with a lantern and a billy in his hand. Plaintiff was then about sixty yards from the station. Brownfield walked up to him, turned the lantern on his face and said, "What are you doing here?" Plaintiff answered that he had come to go on the train when it came in. Whereupon Brownfield said, "I know you. You live here in town. You go home or I will lock you up,"

Digitized by Google

to which plaintiff answered that he was there on business, was going to Caruthersville. Whereupon Brownfield grabbed hold of him and he fell down and his face struck on the edge of the silica on the railroad bed. Plaintiff got up, Brownfield gave him another jerk and then took him by the arm and swore he was going to lock him up; that he had to go home; "said he wouldn't stand for us 'natives' to do that." Plaintiff said to him, "Well, nobody has done anything to you;" that at least he had not. Brownfield called him a liar and plaintiff said he did not like to take that. After they reached the station plaintiff said he was going in to sit down; that he was hurt. Whereupon Brownfield said that he was not going into the depot unless he had a ticket. Plaintiff told him he did not have a ticket but had the money to get one. Brownfield repeated to him that he should go home, and plaintiff said, "No, sir; I am going off on that train when it comes," and Brownfield said that he would get him a ticket. Plaintiff said that would be all right, if that would settle it; that he would "just as leave buy one now as any time." They went to the station and Brownfield went to the ticket window and called for a ticket. Plaintiff asked for a ticket to Caruthersville and back. Brownfield was standing behind him at the time and struck plaintiff with something so that his chin went down on the window sill; struck him on the back of the neck. The agent gave him the ticket and the change and he put the change in his pocket and went to put the ticket in his pocket and said to Brownfield, "What did you hit me for?" and Brownfield hit him and landed him about ten feet from where he was standing, and he struck his breast against the iron on the seat in the waiting room. He got up on his feet and Brownfield came to him and threw him on the floor. Plaintiff got up on his hands and knees and said to Brownfield that he would attend to his case for doing him that way. Whereupon

Digitized by Google

Brownfield drew his billy and plaintiff said he was not afraid of anything, "but please don't say any more, you have hurt me," and asked Brownfield to go away and let him alone. Brownfield cursed and abused him and said that he would show him and came up to him and threw him and struck him on the hip. Plaintiff got up on his feet and Brownfield caught hold of him and threw him back on the seat and pulled a pair of steel nippers out of his pocket and put them on plaintiff's wrist and wrenched it so that it hurt. Plaintiff told Brownfield he was hurting him and asked him what he wanted to treat him that way for; that he was old and sick, and Brownfield said he was going to lock him up, and took him out of the station, dragged him down on the track about seventy-five yards, stopping and wrenching the nippers around which he kept on his arm all the time from the time he put them on, and Brownfield wanted him to promise that he (plaintiff) would not say anything about it, saying to him, "You promise me you will go back and sit down and not say anything about this and I will turn you loose." Plaintiff said that he would not promise him anything; that he was hurt. Brownfield then turned him loose and plaintiff followed him back down and sat for a while in the restaurant, getting some pins to pin up his clothes, Brownfield having torn the buttons off of his shirt. Plaintiff had known Brownfield as a man who was working around the station for the railroad; knew he was in the employ of the railroad but did not know his name until the day before this transaction. Brownfield told him that he was employed about the railroad to keep loafers from loafing around there; told him that at the time he assaulted him; had seen Brownfield order and drive men from there.

Plaintiff further testified that he was humiliated by the attack as there were other people around that saw it and that he was hurt in the right breast and

Digitized by Google

in the back of his head and neck. It was some two months before he could turn his head; was also hurt in the hips by being thrown against the seat; putting the nippers on and jerking him around and hurt him badly and Brownfield had wrenched them so hard that the skin had peeled open. Plaintiff testified he was weak at the time so that anybody could shove him over with a slight push; told Brownfield he was sick; had not been drinking that night nor for sometime before, although was accustomed to drinking to some extent. The train came along about five o'clock in the morning and when it came plaintiff went out and got on the train.

On cross-examination plaintiff testified that he was a kind of doctor; had kept steam baths and was doctoring people by that means. While he had at one time drank a good deal, had not been drinking to amount to anything for over a year and had not been drinking that night. About nine years before he had been arrested for fighting and fined; that was the only time he had ever been convicted of anything although in other difficulties; had heard Brownfield was a policeman or deputy marshal but did not know it.

This is substantially the testimony of plaintiff.

A witness for plaintiff testified that he did not know what Brownfield's duties were under his employment by the railroad company but he had seen him ordering people out of the waiting room at different times, causing them to stop smoking and enforcing the company's rules about the station, which rules were posted up in the station, and had seen him call people's attention to the sign. He would say, "You see that sign there, 'No smoking allowed,' " and he enforced the rules about loafing about the waiting room.

Another witness for plaintiff testified that he knew that Brownfield was working for the defendant

Digitized by Google

railroad company; that he was watching the transfer track and was also supposed to be enforcing the rules of the railroad company about the depot and had seen him engaged in that sort of work about the time of this occurrence. Brownfield had told the witness while he was at this, that he was engaged in the discharge of his duties for the company.

Other witnesses testified that they had seen plaintiff that morning and that he was not intoxicated and that he was considerably injured in consequence of the occurrence between himself and Brownfield. There was testimony to the effect that when one of the officers of the defendant company said something to Brownfield about promoting him for his services at the station in keeping order, Brownfield said he did not care for promotion; he preferred to see his pay check raised.

The defendant Brownfield, testifying on his own behalf, that he was employed by the St. Louis & San Francisco Railroad Company as a machinist, his hours of work being from seven o'clock a. m. to 6 p. m., and that he was paid by the hour. His duties as a machinist were to repair engines, such as general overhauling, light repairs; inspected them as they came in during his hours of duty and was around the depot doing general work. He testified that the railroad company had nothing to do with his duties as a policeman. He wore a star with the words "Deputy Marshal" on it; never knew plaintiff until the morning of this occurrence; saw him coming out of the closet to the west of the depot about twenty feet west of the main track; went up to send a message that the engine was ready and walked around the depot and saw plaintiff then; had on his star at the time and had his billy with him and his nippers. When he met plaintiff out there asked him what he was doing. Plaintiff told him it was none of his business, saying this with an oath and Brownfield told him that it was;

Digitized by Google

that he didn't want any drunks or loafers lying around there to stop the cars with the switch engine working up and down there all the time. Afterwards plaintiff told him he was going to Caruthersville and he started to walk to the depot and fell down over the track. Brownfield lifted him up and they walked into the depot together; denied that he struck him or pushed him down; never touched him at all; he fell down and when he lifted him up plaintiff cursed and abused him and called him everything he could think of and kept striking at him all the time. This occurred in the waiting room; when plaintiff had fallen down on the ground he had abused him in a loud voice. When he told Brownfield he was going to Caruthersville, Brownfield asked him if he had a ticket. Plaintiff said, "No," but that he had "the money to buy one." Brownfield told him, "All right. go and buy it." They went into the depot together. Plaintiff kept cursing him all the time that they were going in there and after he bought the ticket he still kept cursing him and striking at him and he (Brownfield) caught plaintiff by the back of the neck and shook him and told him if he did not keep still and quit using that kind of language he would arrest him and lock him up; after he had bought the ticket he started to turn around and sit down in a seat and fell over and Brownfield told him to sit there and behave himself and he could stay as long as he wanted. Brownfield went out and left him and was gone about fifteen minutes and when he came back plaintiff was walking up and down in the waiting room and told Brownfield with an oath that he was there yet. Whereupon Brownfield told him that he would not be there if he did not quit that kind of language. Plaintiff wanted to know who was going to stop it and Brownfield told him he would and plaintiff sat down in a seat and kept cursing and when Brownfield attempted to reach for the back of his coat plaintiff jerked away from him,

Digitized by Google

threw himself on the floor and said that if he (Brownfield) got him out of there he would have to carry him. Whereupon Brownfield said to him that he had something that would make him go and he put the nippers on him and took him out. When he took hold of plaintiff he was going to arrest him and lock him up and when he reached for him plaintiff jerked away and threw himself on the floor. After the nippers were put on him Brownfield got him out of the station and about forty feet away from the depot when plaintiff commenced begging, said he was seventy-two years old and that he had to go to Caruthersville to attend to a lawsuit he had; that if he was locked up he would lose his suit, so he let him loose about 200 feet away from the depot. Brownfield testified that plaintiff was drinking at the time; that he could smell whiskey on him.

On cross-examination Brownfield testified that while he was on duty around the station he inspected engines and the machine shop, did whatever was necessary; this took up about three-fourths of his time; denied that he was enforcing the company's rules around the depot; if loafers came to the depot would tell them to get out; if they smoked would tell them there was no smoking allowed and would show them the sign, which was posted in the depot; about one-fourth of his time while on duty he was at this depot and if he found loafers in there would tell them to get out. At that time was under the pay of the railroad. As special policeman did not familiarize himself with the city ordinances so that he would know what his duties were as a special policeman but was to keep the peace and make arrests of drunks and disorderlies; had arrested plaintiff for being drunk and disorderly but he was not fined for it and was not put to trial and preferred no charges against him and did not put him under bond. He had put plaintiff under arrest but he begged off.

Digitized by Google

A witness for defendant testified that he was in the depot on the night in question; that he saw Brownfield bring plaintiff into the station and plaintiff bought a ticket to Caruthersville; was talking rather loud and boisterous and Brownfield told him that if he didn't hush he would put him out. Plaintiff told him he would hush when he got good and ready, using an oath. Brownfield told him if he did not hush talking so loud he would lock him up. When he first saw them Brownfield had hold of plaintiff and was bringing him toward the ticket window and when he heard the noise of the door opening, witness raised the ticket window; they were both talking rather loud. Plaintiff was not noisy when he was getting the ticket. Brownfield said to him, "Sit down there or I will lock you up." Plaintiff said he did not think he would, and Brownfield took hold of him to make him sit down. Plaintiff "sulked" on him and fell down or laid down on the floor and Brownfield caught hold of him and took him out of the station.

On cross-examination this witness testified that plaintiff was quiet when he was purchasing his ticket and while he was buying it Brownfield took hold of him with his left hand and pushed him against the window sill; did not hit him, just pushed him and it was while he was buying the ticket that Brownfield gave him the shove; when he next saw plaintiff, Brownfield was getting him up off of the floor; did not know how he got down on the floor; did not know whether Brownfield knocked him down; did not see him do it but saw plaintiff down on the floor and saw Brownfield get the old man up off the floor; did not see him put the nippers on him. Brownfield did not exactly drag plaintiff out of the depot; lifted him up and pushed him out; had hold of him with both hands. This witness was the ticket agent at Hayti and testified that Brownfield was also working for the defendant railroad company at that time and was the night

Digitized by Google

foreman of the roundhouse; his duties did not require him to stay around the depot and enforce the railroad company's orders concerning keeping loafers out of the waiting room and not allowing smoking or spitting on the floor; his duties were to repair engines and he had no other duties that witness knew of but did not know what all his duties were. He was around the depot every night when he was special policeman; before that time he would come up sometimes for information about the engines and want to know about the railroad business there; had seen him enforcing the company's orders around the depot; had seen him tell people to quit smoking and ask them if they had tickets. There was no loafing allowed around the station. There were posters up in the station, reading "No smoking or loafing allowed in here;" did not know whether it was part of Brownfield's duty to enforce these rules but he knew that he worked for defendant railroad; that Brownfield had done that. Brownfield was on the railroad pay roll as roundhouse foreman but he was not at the roundhouse all the time; he worked nights and while not at the depot all the time was there occasionally.

Another witness for defendants, the express agent at the station, testified to what took place in the station that day; his account of the occurrence did not greatly vary from that of the former witness.

At the close of all the testimony the defendant company offered a demurrer to the effect that under the pleadings and evidence in the case plaintiff was not entitled to recover against it. The court refused this, that defendant duly excepting, whereupon, at the request of plaintiff, the court gave three instructions, to the giving of each of which the company defendant duly excepted. On its part that defendant asked six instructions, all of which were given by the court. The defendant Brownfield asked no instructions and has preserved no exceptions. The jury returned a ver-

Digitized by Google

dict in favor of plaintiff and against both defendants for $500 actual and $2500 punitive damages. Whereupon the defendant company filed its motions for new trial and in arrest, both of which were overruled, exceptions saved and appeal duly perfected to this court by the railroad company.

REYNOLDS, P. J. (after stating the facts).—Five errors are assigned here by appellant. First, that the demurrer asked at the close of all the testimony should have been given. Second, third and fourth, that the three instructions given at the instance of plaintiff were erroneous. Fifth, that the verdict is excessive and bears no relation to the injury sustained and that it is grossly excessive in respect to punitive damages.

We see no particular benefit in setting out the instructions given at the instance of the respective parties. It is sufficient to say of those given for plaintiff that in so far as they omitted to specifically set out the duties of Brownfield and to specifically instruct the jury as to what acts it was necessary to find as evidence of the fact that Brownfield was not only a special policeman but also an agent of the defendant railroad company, having duties in connection with the enforcement of the rules of the defendant company in and about the station, that these are more matters of nondirection than of misdirection. Considering the instructions as a whole and in connection with those given for appellant, we think they covered the case correctly. On the facts in the case, as we have briefly summarized them, it is apparent that it was a case for the determination of the jury, subject to the approval of the trial court. This is assuming that the jury was properly instructed as to the law, and we think that it was. We find no reversible error in the three instructions given at the instance of plaintiff.

Digitized by Google

Nor can we agree that the verdict is excessive either as to actual or punitive damages. Assuming that the jury believed the testimony of the plaintiff as to the extent of his injuries, and the suffering consequent on them, the actual damages are not excessive and, if the jury believed the testimony of plaintiff and of his witnesses as to the character of the assault, as they had a right to do, the punitive damages cannot be said to be excessive. There was evidence in the case tending to show that this was a brutal and unwarranted assault by an employee of the railroad company, who, while an inspector of locomotives, engines and machinery and the condition of trains, that is a mechanic, was in point of fact also charged with and engaged in the duty of enforcing the rules of the railroad company in the preservation of order around the station. The impression which the testimony makes upon us is that the official character of a special policeman with which the defendant Brownfield was clothed, was more nominal than real, and entirely for the benefit of the railroad company and to secure more efficient enforcement of its rules. So the jury evidently thought. There is not a particle of evidence in the case tending to show that Brownfield considered himself or that he was considered by anyone else, as having any duties as a special policeman. It is true he was an inspecting machinist and that those duties required his presence at the station. But the evidence shows he was receiving nothing and was to receive nothing whatever by way of compensation from the city for his services as policeman save when he made arrests and a conviction was had; then he was to have the fees allowed by law, if any. The evidence shows that he never received any such fees. While there is no evidence directly showing that the railroad had procured his appointment as a special policeman, it is very evident that his duties as such special policeman were confined exclusively to the premises and the bus-

Digitized by Google

iness of the railroad company. It does not appear that he every did any duty as special policeman anywhere in Hayti than at the station of the railroad. His office as special constable was entirely for the interest and benefit of the railroad company.

It is argued by the learned counsel for appellant that it is clearly established by the evidence in the case, first, that Brownfield was a duly commissioned and acting police officer of the city of Hayti and as such charged with the duty of preserving the peace of the city and that he was especially enjoined by the city to discharge these duties at the station. There is not a particle of evidence in the case to show any ordinance of the city relating to the matter of those duties or their discharge by Brownfield. He testified that he did not know what the ordinances were, and the only orders the evidence shows he was enforcing about the station were the orders of the railroad company itself, those orders evidenced by the signs posted up in and around the depot. These were the orders of the railroad company, not ordinances of the city.

The second point made as to this matter of employment is that Brownfield at the same time was an employee of defendant in the capacity of a machinist and that his duties as such required him to inspect and repair engines moving through Hayti and necessitated his presence at the depot at frequent intervals and that no instructions were given him by defendant which required him as a part of his duties as an employee of defendant to make arrests or to discharge any of the functions of a police officer. That may be, but the evidence shows that he was discharging the duties of a watchman and this with the knowledge at least of the local agent of the company, and apparently of other officers of appellant. No one else paid him; his time from 7 p. m. to 6 a. m., belonged to the railroad company and he was paid by the hour.



Digitized by Google

His duties as policeman were incident to his duties as a mechanic. He was not made machinist because he was a policeman but was made a policeman because his duties as machinist kept him at and around the depot all night. Obviously he was clothed with police powers solely for the purposes of the railroad and for its protection and not for the protection of the general public. So the jury obviously found, and it followed, as it also found, that the railroad company was responsible for his acts in and about its premises, no matter in what capacity and in the exercise of what powers he acted. His police powers were exercised for the sole benefit of the defendant railroad; the general public got none of his assistance; he patrolled no beat outside of the railroad premises; exercised no powers elsewhere. It is evident that but for his employment by the railroad company Brownfield would not have held the appointment of a special policeman. Receiving the benefits of his services, paying him for them, the railroad company cannot escape responsibility for his acts.

On the whole case we find ample evidence to sustain the verdict of the jury and no reversible error to the prejudice of this defendant in the instructions given. The judgment of the circuit court is affirmed. *Nortoni* and *Caulfield, JJ.*, concur.

Digitized by Google

# LOUIS H. BUTTS, Respondent, v. GAAR-SCOTT & COMPANY, Appellant.

**St. Louis Court of Appeals. Argued and Submitted February 9, 1912. Opinion Filed March 5, 1912.**

1. **TRIAL PRACTICE: Demurrer to Evidence: Waiver.** Where defendant puts on evidence after his demurrer to the evidence offered at the close of plaintiff's case is overruled, and again offers a demurrer at the close of the whole case, he waives the first demurrer.

2. **NEGLIGENCE: Questions of Law or Fact.** What is negligence in a given case is a matter of law, but the determination of the facts constituting negligence or due diligence are for the jury.

3. ———: **Injuries to Railroad Engineer: Vehicle Obstructing Track: Liability of Owner.** In an action by a railroad locomotive engineer against the owner of a grain separator for injuries sustained by reason of a collision between the separator, which was stuck on the track at a crossing, and the locomotive, evidence *held* to present a question for the jury whether reasonable diligence was exercised by defendant to remove the separator from the track or to warn approaching trains of the obstruction.

4. **TRIAL PRACTICE: Credibility of Witnesses: Province of Jury.** The credibility of the witnesses and the weight to be given their testimony are questions for the jury.

5. **RAILROADS: Injuries to Engineer in Crossing Collision: Contributory Negligence: Speed.** Whether it is negligence for a railroad train to approach a country highway crossing at the regular, scheduled speed of about twenty-five miles an hour, there being no reason for apprehending an obstruction, is, in the absence of a statute regulating the speed, a question for the jury; and the burden is on the party asserting it to prove that such speed was excessive.

6. ———: ———: ———: **Jumping from Engine.** In an action by a railroad locomotive engineer, against the owner of a grain separator for injuries sustained by reason of his jumping from the engine while it was in motion, when a collision between the separator, which was stuck on the track at a crossing, and the locomotive seemed imminent, whether, under these circumstances, it was negligence for him to jump from his engine while it was in motion, *held*, a question for the jury.

Digitized by Google

7. **NEGLIGENCE: Contributory Negligence: Emergency Acts.** Where a person, when confronted with a sudden peril, chooses what appears to him, in his fright and confusion, to be a means of safety, he is not guilty of contributory negligence as a matter of law because the means adopted turns out to be disastrous for him.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench,* Judge.

AFFIRMED.

*Ferriss, Zumbalen & Ferriss* for appellant.

The court erred in overruling the demurrer to the evidence offered at the close of plaintiff's case, and again interposed at the close of the whole case, because: (a) There was no evidence of any negligence in warning the approaching train of the obstruction on the crossing. Frounfelker v. Railroad, 77 N. Y. Sup. 470; Railroad v. Culpepper, 19 Tex. Civ. App. 182; Smith v. Railroad, 113 Mo. 70. (b) There was no evidence tending to show any negligence in removing the obstruction from the crossing. (c) Plaintiff was himself guilty of negligence in operating the train, by approaching a dangerous public crossing at a high rate of speed, the crossing being hidden from his view until the train was almost upon it. 8 Am. and Eng. Ency. Law (2 Ed.), 390-392; 3 Elliott on Railroads, secs. 1160, 1161; Halferty v. Railroad, 82 Mo. 90; Stepp v. Railroad, 85 Mo. 229; Eswin v. Railroad, 96 Mo. 290; Sullivan v. Railroad, 97 Mo. 113; Haley v. Railroad, 197 Mo. 15; Holmes v. Railroad, 207 Mo. 149; Imp. Co. v. Stead, 95 U. S. 161; Railroad v. Netolicky, 14 C. C. A. 615; Ellis v. Railroad, 138 Pa. St. 506; Schwarz v. Railroad, 211 Pa. 625; Kinyon v. Railroad, 118 Ia. 349; Folkmire v. Railroad, 157 Mich. 159; Railroad v. Thompson, 62 Ala. 494; Railroad v. McGill, 121 Ala. 230; Railroad v. Mathews, 36 N. J. L. 534; Railroad v. Stoner, 2 C. C. A. 437; Kelly v. Rail-

Digitized by Google

road, 92 Mich. 19; Railroad v. Railroad, 154 Mo. App. 156. (d) Plaintiff was guilty of contributory negligence in jumping through the window of the cab while the train was running at full speed. Kleiber v. Railroad, 107 Mo. 240; McPeak v. Railroad, 128 Mo. 617; Richmond v. Railroad, 133 Mo. App. 463.

*Marion C. Early* for respondent.

(1) Persons attempting to cross railway tracks are required to exercise a degree of care commensurate to the possible dangers considering the character of the crossing, number of trains and the kind of machinery proposed to be transported over the crossing. Railroad v. Dunn, 56 Pa. St. 280; Gage v. Railroad, 6 Pa. Co. Ct. Rep. 4; Gramlich v. Railroad, 9 Phil. 78; Bullock v. Railroad, 105 N. C. 280; Railroad v. Ref. Co., 129 N. Y. 597. (2) After the breakdown on the crossing it was incumbent upon defendant and its servants to remove the obstruction within the shortest time and space possible, and to this end use all the aid and means available, and this was not done. There is evidence that there was ample time within which to have done so had a proper effort been made. The issue was fairly submitted to the jury and the verdict is conclusive. Railroad v. Lackey, 21 So. 444; Railroad v. Railroad, 37 Atl. 627. (3) It was incumbent upon defendant as soon as the breakdown occurred to use a high degree of care to warn approaching trains of danger. There is abundance of evidence that such efforts were not made, and the issue was properly submitted to the jury. Railroad v. Lackey, 21 So. 444; Railroad v. Railroad, 37 Atl. 627. (4) The plaintiff was not guilty of contributory negligence in jumping from the engine to save his life. He believed he was in imminent danger and the issue was properly submitted to the jury. Feddeck v. Car Co., 125 Mo. App. 24; Hull v. Transfer Co., 135 Mo. App.

Digitized by Google

119; Bren v. Transit Co., 108 Mo. App. 399; Railroad v. Jacobs, 101 Ala. 149; Cottrill v. Railroad, 47 Wis. 634; Railroad v. Lane, 79 Tex. 643; Lierman v. Railroad, 82 Wis. 286. (5) The train was running at its usual and lawful rate of speed. The statutes of Missouri fix no rate of speed at which trains may not be run outside of municipalities. In this case the whistle was sounded for the particular crossing and every regulation observed. Goodwin v. Railroad, 75 Mo. 73; Powell v. Railroad, 76 Mo. 80; Danskin v. Railroad, 22 L. R. A. (N. S.) 232; Dyson v. Railroad, 57 Conn. 9. (6) The train had a right to a clear track. Fiedler v. Railroad, 107 Mo. 645; and see Frost v. Railroad, 96 Mich. 470.

STATEMENT.—This is an action by plaintiff against defendant, appellant, to recover damages for personal injuries sustained by him. Plaintiff was a locomotive engineer in the employ of the St. Louis & San Francisco Railroad Company, hereafter referred to as the Frisco. At the time of the accident he was in charge of a locomotive of that company, driving his engine attached to freight cars over the tracks of the railroad company from the town of Eureka, Missouri, and beyond, the city of St. Louis, which is about twenty-seven and one-quarter miles east of Eureka, being the destination of his train. When about three-quarters of a mile east of Eureka and at a crossing of a public road called the Blakey road, seeing that his engine was about to run into a grain separator, which was directly across the track at this crossing, plaintiff jumped through the cab of his locomotive, with the result that both of his legs were broken between the ankles and knees and it became necessary to have both amputated immediately below the knees, making him a cripple for life.

The grounds of negligence averred in the petition are, first, to state it generally, negligently and care-

Digitized by Google

lessly driving the separator and engine, hereafter called traction engine, and which was drawing the separator, on to the track of the railroad, whereby the separator became stuck on the tracks between the rails.

Second, that after the separator had been so negligently pulled upon the railroad track, the employees of defendant negligently and carelessly allowed the same to remain upon the tracks for about twenty or twenty-five minutes, although having a sufficient number of men immediately at hand, and sufficient means and appliances available readily and quickly to have removed the separator from the tracks and to have avoided the collision.

Third, that after the separator had been so negligently pulled and left upon the track of the railroad as before stated, that although defendant and its employees well knew or could have known with the exercise of ordinary care that trains were due to pass over and along the line of railway at frequent intervals and that they did so pass and that the separator in its position across the tracks, was liable to be run into by trains operated upon the railroad and injure the employees operating them and passengers upon the train, and to injure the trains, and knew that the separator, as an obstruction upon the track, was a dangerous menace to life and property, defendant and its employees in charge of the separator negligently and carelessly failed to notify the train dispatcher at Eureka and negligently and carelessly failed to send or attempt to send a flagman out in each or either direction to warn approaching trains of danger, and negligently and carelessly failed to give or make any ordinarily careful attempt to give any warning to approaching trains, though there were ample means and time with and within which warning could have been given to such trains, and negligently and carelessly allowed the separator to remain upon the track and obstruct the passage of trains for about twenty or twenty-

Digitized by Google

five minutes after the separator had become jammed in the tracks, thereby causing the accident. It is further averred that the train was running at its usual rate of speed; that immediately upon seeing the obstruction plaintiff applied the emergency brakes with full force, reversed the engine and did all in his power to check the speed of his train but seeing that a collision was inevitable and that the engine was liable to be derailed and the train wrecked, and believing that his life was in imminent danger by reason of being about to run into this obstruction, he sprang from the window in the cab of the engine and struck the ground with great force and violence. Averring his injuries as before stated and what his wages had been and that by the accident he was disabled from following his vocation as an engineer, he prayed damages in the sum of $40,000.

The answer of defendant, admitting its incorporation and that on the day of the accident it was the owner of the traction engine and separator, and that while these machines were under the charge and control of defendant's agent, one Johnson, an eastbound freight train of the St. Louis & San Francisco Railroad Company collided with the separator at the crossing, it denies each and every other allegation in the petition. As a further defense, defendant pleads the contributory negligence of plaintiff in that he failed to heed the signals given by defendant's servants for the purpose of flagging the train and failed to look ahead and keep proper watch to see that the track at the crossing of the public highway was unobstructed and ran the train at a high and dangerous rate of speed as it approached the crossing of the public highway and negligently jumped from the train while the same was running at a high and dangerous rate of speed.

The reply was a general denial of the new matter in the answer.

Digitized by Google

The cause was tried before a court and a jury. The evidence is quite voluminous. Probably the most intelligible way of stating the case is to commence with defendant's part of it. On the day mentioned, one Johnson, a district agent for defendant, who had been in the business of selling and handling traction engines and separators for some thirty years, left St. Louis and went to the farm of a Mr. Cihak, situate on or near the Blakey road, to take an engine and separator from that farm into Eureka, the intention being to load and ship the engine and separator back to defendant's factory at Richmond, Indiana. He was accompanied by his engineer, a Mr. Nevin, and also by Mr. Cihak, whom he had engaged to furnish fuel and haul water to fill the boiler, and they fired and steamed up. They also had a wagon and team in charge of a Mr. North, the wagon carrying water, fuel, a log chain and possibly other material. A son of Mr. Cihak, a boy about fourteen years old, was also with the party. The traction engine was connected up with the separator and after steam was up they started out along the road toward Eureka. The water wagon referred to was being driven ahead of the engine. They were going along the Blakey road in St. Louis county, which road runs past Cihak's farm toward the Frisco, then turning to the west runs along the side of the Frisco tracks for about 600 feet, and turning northwardly crosses those, not at a right angle but diagonally, and then takes on up a slight rise to the Missouri Pacific Railway Company's tracks, and crossing those about a quarter of a mile north of the Frisco, goes on west to Eureka. There is a slight rise from the Blakey road to the railroad at the crossing of the Frisco. About a quarter of a mile before the Frisco reached this crossing, as it leads east from Eureka, it curves sharply around a slight hill, but from Eureka to the curve the tracks are straight. The crossing is about a quarter of a mile west of the beginning of the

Digitized by Google

curve. When the traction engine and separator approached the crossing, Johnson and Cihak walked up to it and saw it was clear. Whereupon the engineer of the traction engine, being told to come ahead, steamed up and started toward the crossing. Reaching the crossing the traction engine passed safely over the tracks, but one of the wheels of the separator slid off of a plank inside of the south rail and became jammed. The traction engine still pulling, broke off a clip on one side of the axle, throwing the strain on the remaining clip, and forcing one of the front wheels under the body of the separator, so that the separator became immovable. The faces of these wheels of the separator are eight inches; the engine, an eighteen-horse power one, weighs about 1800 pounds, the separator about 6000 pounds, was about ten feet high from the ground to the top of the front end, and from front to rear is twenty-five feet and one inch over all, the body, from front to rear axles being fourteen feet, five and one-fourth inches. The tongue of the separator is twelve feet long and is attached to the front axle of the separator by two forks or "clips." As soon as the men in charge found the wheel was caught they disconnected the remaining clip. After doing that they grabbed hold of the front axle of the separator and tried to swing it back into position so that they could back the separator off the track if possible. They found they could not do that because the left wheel was wedged and they could not swing it, Johnson, Cihak, Nevin and a Mr. Peppers all pulling at it. Johnson then called to North to bring down the log chain from the wagon which was across the tracks and up on the hill. North threw it out of the wagon and Cihak took it down to the separator. They started to attach the chain to the front axle of the separator and Johnson called to North to bring the team down, that is the horses attached to the wagon. North refused to bring the

Digitized by Google

horses, as just then they heard a train which they first thought was on the Frisco tracks, but which proved to be on the Missouri Pacific tracks. As that train passed east they heard another train, and saw the men who were up on the hill between the Frisco and the Missouri Pacific tracks pointing toward Eureka and heard them hallooing to them, and they then saw the smoke of another train coming toward them from the west of Eureka on the Frisco track. At this time the traction engine was probably twenty feet north of the track and the separator projected over the track about seven and one-half feet of its own length, the balance of it trailing off south of the railroad tracks. The train which they had heard coming along the Frisco track, came on and its engine struck the separator and knocked it to pieces. There was evidence on the part of defendant tending to prove that as soon as it appeared that the separator was stuck on the crossing, Mr. Johnson had immediately sent Mr. Cihak's son along the track to the station agent at Eureka to notify the agent there that they had broken down on the track and to stop any trains approaching from either direction and told the boy to flag any train approaching from either direction and also told the boy to flag any train he saw approaching; told him to get to the station as fast as he could, and the boy testified that he started up the track "as tight as he could tear." After they heard the train whistle at Eureka and saw that it was coming down the Frisco track, Johnson told Mr. Cihak, Sr., to run up the track and flag it. Cihak started up the track immediately toward the train, ran as rapidly as he could with his hand and his hat up, calling and making all efforts he could to attract attention. After Cihak had gotten a short distance, Johnson, seeing that the train was apparently gaining speed, followed Cihak up the track, throwing up his hands and waving his hat and making every possible effort to attract the attention of the

Digitized by Google

engineer, while Mr. North remained at the separator, disconnecting the chain and pulled it and the tongue off the track and out of the way. Young Cihak testified that when the separator broke down, his father and Mr. Johnson sent him right off as soon as it happened to notify the agent to stop the train. He ran but did not get to the station; was at the twenty-seven mile post which, according to the plat, is about a quarter of a mile east of the station, when the train passed him. As the train came he waved his hat over his head and continued to do that until he had to get out of the way.

Joseph Cihak, Sr., testified that as soon as they had got caught on the track, he started his boy to Eureka and told him to run as fast as he could and notify the agent there was a machine broke down on the track so that he could stop the trains on both sides until they could get the machine off. His son started off pretty fast but he did not watch him. After testifying to what they had done in attempting to get the separator off and that he had gone to the water wagon to get the chain, he testified that North threw the chain out and unhitched the team but called out that he would not take the team down there. He looked around to see what was the matter and then noticed that somebody, probably one hundred yards off, was pointing up toward Eureka. He looked up and could see the smoke of the coming train and knew that the train was approaching. He called out, "The train is coming," and started up the middle of the track as quickly as he could run, waving his hat; got about two hundred yards (five or six hundred feet) up the track, maybe a little further, when he reached the train. When he saw the smoke, he knew the train was east of Eureka and that his son could not have got there in time to have stopped it, so he ran to try and flag it and he kept running and waving his hat until he had to jump off the track. To the best

Digitized by Google

of his judgment the separator had been on the track from seven to ten minutes when the train struck it—at the outside ten minutes. Johnson testified that he ran up the track, waving his hat and arms, a distance of four or five hundred feet, until he was about to be run down by the train, and then jumped off the track; did not see anyone in the cab until just before he jumped off the track and then he saw the engineer and the next instant the engineer (plaintiff) jumped from the cab. He jumped about one hundred and fifty or two hundred feet east of where he (Johnson) was. Johnson testified that he had started up the track after they had called for the chain and did not hear the Frisco train whistle but he saw someone up on the hill pointing up the track toward Eureka and then saw the smoke and saw Cihak starting up the track and he followed pretty close after him. He testified that the separator was on the crossing from eight to ten minutes before the train came, not to exceed ten minutes; did not look at his watch, and in a deposition which he had previously given, he had placed the time at from ten to fifteen minutes but he now testified that he did not think it was over ten minutes from the time they were caught on the crossing until the accident occurred.

The testimony for defendant tended to prove that the men with the machinery, assisted by a Mr. Peppers, a by-stander, did all they could to clear the track, and that the Frisco train came on and was running at a rate of about thirty miles an hour when its engine hit the separator.

The evidence on the part of plaintiff tended to show that the separator had been across the railroad track some twenty or twenty-five minutes before the collision occurred. Plaintiff himself testified that as he approached Eureka he whistled for the town when about a mile west of it. They were then going thirty miles an hour. The track is level there and straight.

Digitized by Google

He then whistled for the order board. They got no order board but the operator at Eureka came out and gave a stop signal whereupon the operator held up an order; the conductor got down on the step and got it from him. They had then slowed down to about ten miles an hour. After getting the order the brakes were released and the engine speeded up again. Plaintiff testified that as they left Eureka he saw no one on the track signalling the train. The train was running slow enough as it left the yards at Eureka had anyone called to them to have heard him. The track curves around a hill at the crossing and from the seat of the locomotive on which the engineer was standing he testified that he could see the crossing when about one hundred and fifty feet from it. He was standing up, leaning out of the window and looking ahead. On the fireman's side you could not see an obstruction twelve or fourteen feet high on the crossing until you were within one hundred yards of it. (It is to be said here that it was assumed that the separator was about twelve or fourteen feet high, instead of being under ten feet, as was subsequently developed.) The fireman called to plaintiff and gave him a "quick stop" sign, whereupon plaintiff set the brakes and emergency with full force, reversed the engine and did all in his power to stop the train. The first thing he saw as he approached the crossing was a man running toward them who had his hat off and was waving it above his head, which in railroad usage is called a "highball" signal, meaning that the track is clear. He heard no one call or make any noise. This man was between an electric block signal, which is about one hundred and fifty feet west of the crossing and the crossing, and about one hundred feet west of the crossing. After plaintiff saw this man waving his hat, he kept looking ahead and saw this big obstruction and thought the chances were that the engine would be derailed, the train wrecked and he would be killed; saw that a

Digitized by Google

collision could not be avoided. He testified: "I was overcome with fright; just simply lost control of myself for a moment and jumped off the train to save my life." When plaintiff jumped he testified that he came very near jumping on the man that he had seen running toward him and giving the "highball" signal. The first intimation that he had of any danger was from the fireman. As the engine approached the crossing and about six hundred yards west of it, he had blown the whistle for the crossing. At the time of the collision they were running about twenty-five miles an hour, which was the usual schedule speed at that crossing and the signals they had received were for a clear track from Eureka to Tyson, a station some miles east of Eureka, distance not given. Plaintiff further testified that he was thoroughly acquainted with the road and knew that he could not see that crossing more than one hundred yards off. He testified positively that there was no boy anywhere near the track after he left Eureka for if there had been one he was positive he would have seen him. He saw the obstruction just at the time he saw this man give what he called the "highball" signal, then he jumped feet foremost, going through the window of his cab. Plaintiff struck the ground about one hundred feet west of the crossing and got the signal to stop about one hundred feet west of that. At the speed at which the train was going it could have been stopped within five hundred yards.

The conductor of the train upon which plaintiff was engineer testified on behalf of plaintiff that he was in charge of the train that evening and knew the locality; that looking from the right hand side of the engine as you came to this crossing he did not think you could see over one hundred feet unless you hung way out of the window and looked around the boiler; from the left side of the engine you could see two hundred or two hundred and fifty feet, maybe further.

Digitized by Google

When he first saw the obstruction he thought they were within about three hundred feet. They were about that distance from it when the fireman or head brakeman hallooed and said there was something on the track. The engineer put the air on the emergency brake and reversed the engine and the witness jumped on the fireman's seat and when he looked back the engineer had jumped off. The first that he saw of anyone coming down the track to warn them was just about the time that the fireman or head brakeman had hallooed, when he saw a man wave a straw hat at them and just about the time that he saw this man the danger signal was sounded.

On cross-examination he said he could not tell how much of the separator was on the track; "it was just like a flash; just see it in front of you;" could not tell whether it stood at right angles or how it stood but could see it was a separator.

On redirect examination, he testified that he thought the man who had given the signal by waving his hat was about a couple of hundred feet or something like that; he did not measure it, but he judged it was about that far, west of the crossing.

Another witness for plaintiff, the head brakeman, was on the engine with plaintiff at the time of the accident; was at his usual place; as they approached Eureka they whistled. As they got to the station they slowed down to eight or ten miles an hour and answered the stop signal; as they were leaving the town of Eureka they did not observe anyone approaching the train. Asked if he thought that if anyone had been there, any man, going at that rate of speed, it would have been possible for him to have spoken or hallooed so that they could understand him, going at the speed they were, he answered that he thought they could. The first time he learned there was any danger on the track he should judge they were about two telegraph poles from the crossing. He was on the

Digitized by Google

left hand side of the engine, the north side of the track. The first time his attention was called to the fact that there was an obstruction on the track was when he saw it himself, although before that the fireman had hallooed something but he did not know what. He (the head brakeman) was looking ahead. As soon as the fireman hallooed the engineer reversed the engine, put the brakes and emergency on and the witness (the head brakeman) started to get off the engine. There was nothing else could be done to stop after the emergency brakes were set. This witness stated that he was on the fireman's seat and started to get off the engine but did not have time. He was facing the engineer and saw him jump out of the cab window but he (witness) did not have time to get off so he jumped on the coal pile (in the tender) about the time the engine struck the machine; stayed on the engine until it had hit the obstruction and jumped off after that but before the engine stopped. He jumped off because he was afraid the engine would turn over and kill him.

On cross-examination this witness was asked if he saw a boy about fourteen years old on the track. He answered that he did not. Asked if they were in the habit of running through the country and approaching crossings on curves without slackening speed, he answered that they observed all road crossings and expected to stop if they got any warning of danger. Asked if they run across crossings at the same rate of speed as on other parts of the track, in the absence of any orders to the contrary or any knowledge of danger, he answered that they have no orders to stop at country roads and that the practice is not to do so. From where he was standing in the cab, on the inside and going toward the crossing, he could see an obstruction twelve or fourteen feet high about one hundred yards off. When he saw



Digitized by Google

this obstruction he did not know whether it was on the track or not; could not tell until he got up to it, could not tell whether it was on or off the track. Asked within what distance he could tell something was on the track, he said not until he got within 150 or 200 feet, when he found out what it was; that he could tell that there was an obstruction on the track about 300 feet or two telegraph poles.

The fireman on the train with plaintiff at the time of the accident testified that he first became aware that there was any danger on the track when they were about 100 yards off, when he gave the engineer the stop signal, meaning "danger ahead." Asked if he had seen anybody coming toward the train before that, he answered that he had not, until about the time he saw the obstruction; could see the obstruction when he was about 300 feet from it and gave the danger signal as quick as he saw it, when the engineer immediately put on the emergency brakes and reversed the engine. There was nothing else the engineer could have done to stop the train.

On cross-examination this witness testified that it took them about five minutes to run from Eureka to this crossing on that date; it was about three-quarters of a mile between the two. At the time they struck the obstruction they were running about twenty-five miles an hour.

The station agent of the Frisco at Eureka testified that he was off duty on the evening of this accident; that trains average about one every forty-five minutes along the Frisco in the evening but freight trains are liable to come at any time either way. He saw this train on which plaintiff was engineer; was in his front yard a half a block north and a block west of the Frisco station at Eureka. He first heard them whistle for town and then for the order board and as the whistle was not answered, they whistled again

Digitized by Google

and he then saw the operator on the platform with his order hook, handing up orders to the conductor; it was what was called a No. 19 order, delivered to the train by means of a hook as the train passes, without the necessity of the train stopping. The train slowed up some for the orders; was then going about ten or twelve miles an hour. About the time the engine passed the depot he saw a little boy coming west up the track toward the station, down about the east switch, which was something like 600 feet east of the station; he had his hat off and was waving it above his head. The train was then moving ten or twelve miles an hour when he saw the boy waving his hat; thought it would have been possible for a man to have hallooed to the engineer or to have spoken to him so he could have heard with the train going at that rate of speed.

Mr. North, who was driving the water wagon before referred to, called as a witness by plaintiff, testified that he was there with his wagon and was part of the crew with Mr. Johnson in moving the traction engine and separator. He testified that the traction engine was the largest one he had ever seen in the country; that when they broke down Johnson and Cihak "were going forward and backward quite a while;" could not tell exactly what they were doing; "it seemed like they were trying to do something but they made no headway at anything." Witness's team was some distance further up the hill from the railroad and while he was there he heard a rig coming down from the Missouri Pacific crossing. It was driven by a Mr. Nollman and he went up and stopped him. Then a Mr. Peppers came with his team and he stopped him; Peppers went down to where the separator was across the track. Up to that time no one had called upon witness to assist in trying to move the separator from the track but "quite a while after" the separator had stuck on the track they called on him for the log

Digitized by Google

chain which he carried in his wagon. The chain was about twenty feet long. He heard the train on the Frisco whistle for Eureka. Up to that time there had not much of anything been done that he could see except to put the chain around the axle. When witness heard the train whistle for Eureka he hallooed to them that they had better get that off. They called to him to bring down the team; he unhitched and drove the team down but told Mr. Cihak that the best thing they could do was get the chain off as quick as they could as they were going to be knocked off. That was after he heard the train whistle for Eureka; had not been called on before this by anyone there to assist although he was there ready to assist; all he was called on to do was to get out the chain and to unhitch the team. "The Frisco train whistled just after they asked for the chain." Asked on cross-examination if Mr. Cihak or Mr. Johnson had not called to him to bring the chain right after they stopped or as soon as the separator stopped on the track, he said "No, sir;" could not tell what they had been doing before that as he did not see them doing anything.

Mr. Peppers, another witness for plaintiff, testified that he had been there on the day of the accident and was near the Missouri Pacific railroad, going down towards the Frisco crossing (the tracks being about 1400 feet apart). When he first saw the traction engine and separator he was about fifty feet south of the bridge on the Missouri Pacific crossing. They were just going on to the Frisco crossing and this witness drove on down toward it. He had a wagon and a team and drove down from the Missouri Pacific tracks at a common walk. When he got near the Frisco crossing he stopped his team and looked down to where Johnson and the other men were by the separator at the crossing. He saw Mr. North, Mr. Nollman, Mr. Cihak and two machine men there, six of them in all. This witness went on down to where the

Digitized by Google

machine was. When he got there the two machine men and Mr. Cihak were there. Asked if he saw anyone start toward the town of Eureka at that time he said he had seen Mr. Cihak's boy start; that after he (Peppers) was there a few minutes Mr. Cihak told this boy to go and see Snyder (the station agent) and tell him to flag the train "that the separator was broke down on the crossing." The boy started down the track toward Eureka. Witness heard the train whistle for Eureka. He had already gotten down to the separator before he heard that. He heard nothing said about the log chain being brought or the team brought to assist in pulling the separator across until after the train had whistled for Eureka, then Mr. Cihak asked for the log chain; told Mr. North to bring down the log chain. In answer to a question as to how long the engine and separator were on the track from the time he saw it pulled on until he saw the train coming, he answered that he should judge from twenty to twenty-five minutes. He testified that he could walk from the crossing to Eureka in nine minutes; that he had tried it; that he could drive there in an ordinary trot from the crossing to Eureka in about five minutes; had done that. He did not at any time see any of the men about the separator afterwards send a flagman out at any time or hear anything said about it.

A Mr. Brundege, examined on the part of plaintiff, testified that he was engaged in sawmilling and threshing wheat; knew the crossing where the accident occurred; had crossed it several times; had seen the traction engine and had seen the separator; was accustomed to moving traction engines and separators over the country and across railroad crossing in that vicinity from time to time and is familiar with the lay of the land at this particular crossing. Asked how many men it would have required to move this traction engine back from the position in which it was

Digitized by Google

on the day of the accident, he answered that he should judge four or five men could have worked it off and pushed it down hill, possibly four, five or six, or about that number. If a log chain had been available he could have gotten it off by hitching to the engine and pulling it off, and he thought that could have been done in five, six or eight minutes. This witness stated that if he had been in charge of the separator at the time he could have gotten if off in from eight to ten minutes.

This is a summary of a great mass of testimony, not very complete, but sufficient to give the general facts, and to show the evidence in the case as to the effort made to get the separator across or off of the track, as to the warning given, as to the time that the obstruction had been on the track, was conflicting. We have given the evidence of plaintiff more fully than that of defendant, for at the close of that and again at the close of all the testimony the defendant interposed a demurrer to the evidence. The court refused each of these. The case was then submitted to the jury under instructions of the court and the jury returned a verdict in favor of plaintiff in the sum of $7500. Interposing a motion for new trial, which was overruled, plaintiff has duly perfected his appeal to this court.

REYNOLDS, P. J. (after stating the facts).—In their argument before us the learned counsel for appellant state that the only points they urge on this appeal are that the lower court committed error in overruling the demurrer to the evidence, asked by defendant at the close of plaintiff's case and also in overruling that demurrer when it was again offered at the close of all the testimony.

It is argued that these demurrers should have been sustained because, first, there was no evidence that defendant was guilty of any negligence in the

Digitized by Google

premises, and secondly, plaintiff's own evidence shows he was guilty of contributory negligence in approaching a dangerous crossing which could not be seen by the trainmen until they were close upon it, at full speed and without having his train under control and also in jumping through the window of the cab while the train was going at a high rate of speed. Counsel for appellant further state that the court submitted the case to the jury on the theory that defendant was negligent in two particulars, namely, first, in not warning approaching trains of the obstruction, and secondly, in failing to remove the obstruction from the crossing. It may be said here that the assignment of negligence in going upon the track and in the manner in which defendant's employees approached the track with the traction engine and the separator is out of the case, there being no claim that there was any negligence connected with that. It seems hardly necessary to cite authority in support of the rule that defendant, not standing on a demurrer to plaintiff's evidence in chief and then producing evidence, has waived the first demurrer. [See Frye v. St. Louis, I. M. & S. R. Co., 200 Mo. 377, l. c. 381, 98 S. W. 566.] We concern ourselves then with the demurrer at the close of all the evidence.

If we are to adopt the theory of the learned counsel for appellant, it would require us to hold as a matter of law, that after the employees of defendant found that the separator was blocked on the track and after they heard the approach of the train, they had used due diligence and taken proper and prompt steps to warn those in charge of the approaching train of the obstruction; that we should hold, as a matter of law, that defendant used due diligence in attempting to remove the obstruction from the crossing after the wheels of the separator had become blocked; that we should hold as a matter of law that plaintiff was guilty of contributory negligence in respect to those acts of

Digitized by Google

negligence with which he is charged. We cannot agree that under the evidence in this case these are matters of law.

What is negligence in a given case is a matter of law, but the determination of the facts constituting negligence or due diligence are for the jury. The second instruction given at the instance of defendant itself practically concedes this. That instruction tells the jury, "that the only issues before you are whether or not the servants and agents of the defendant were negligent in failing to remove the separator from the railroad track before the collision occurred; and whether or not the said servants and agents exercised ordinary care to notify the station agent at Eureka and warn approaching trains of the obstruction on the track; and whether or not the plaintiff was guilty of negligence directly contributing to his injuries, either in failing to see and heed the signals given him and the obstruction on the crossing in time to have averted the collision or in running his train at a high rate of speed in approaching said crossing, or in jumping from the cab of the engine while the train was running at a high rate of speed, as the above issues are defined in other instructions." It may be said as to the definitions referred to as covered by other instructions, no complaint whatever is made of them and, as before said, the only error assigned here is in overruling the demurrer to the evidence. That the evidence is conflicting on the issue as to whether the employees of defendant, in the exercise of reasonable diligence, could have removed the obstruction in time to have cleared the track for trains passing over the road, and particularly before the train upon which plaintiff was the engineer could have reached that point, is beyond question. The credibility of the witnesses who gave this testimony, the weight to be given it, were for the jury.

Digitized by Google

So too, with the evidence as to whether the employees and agents of defendant had exercised ordinary care to notify the station agent or warn approaching trains of the obstruction. The jury had the testimony as to what was done; they heard the positive testimony of plaintiff and his witnesses, that they received no notice whatever until within some three hundred feet of the obstruction and that the signals then given to them were of such a character that in railroad usage they understood them to be signals that the track was clear. Whether they were justified in so construing the attempt to signal them, was for the jury. While the testimony of the younger Cihak was that he had reached the train within a short time after it passed Eureka, and while there is testimony of one of the witnesses for plaintiff that he saw a boy up in that neighborhood, the testimony is equally positive on the part of plaintiff, the conductor, the fireman and the head brakeman, that they neither saw this boy at that place or at any place nor heard him hallooing to them or making any sign whatever. As to the testimony of Johnson and of the elder Cihak, of their advance down the track to warn the train, the time when they started to do this, the kind of signals they made, the means they employed to signal the train, these were all in evidence before the jury. It appears without question, from the testimony of these witnesses themselves, that when they had run but a short time and distance, the train was so close on to the obstruction that when they jumped out of the way of the approaching engine the train had not gone much over one hundred feet when plaintiff leaped from the cab, and that was but a short distance from the obstruction. Furthermore, the time when these two men and the boy had started up the track to give the warning, presented a conflict of testimony, the solution of which rested entirely with the jury. It was for the jury to determine whether proper precautions were

Digitized by Google

taken to warn approaching trains. It is in evidence that about forty-five regular trains passed there daily, and many freight trains. Cihak, at least, must have known this for he lived a very short distance from the crossing.

As to the rate of speed of the train being excessive, under the facts and situation, to sustain the contention of the learned counsel for appellant, we would be obliged to hold as a mattr of law that that rate was excessive. It is to be remembered that in the case at bar, this occurred in the country at a road crossing and no ordinance, as in case of street crossings in cities, regulates the speed nor does any statute do so. Aside from the statutory or municipal regulation, no rate of speed at which a railroad train may be run is negligence *per se.* [Powell v. Missouri Pacific Ry. Co., 76 Mo. 80; Young v. Hannibal & St. Joseph Railroad Co., 79 Mo. 336, l. c. 340.] As is said in the latter case by Mr. Commissioner Philips, "What would be a negligent rate of speed under certain circumstances might be wholly blameless under others." From the testimony in this case and especially aided by the plat in evidence and which is before us, while it appears that there is a sharp curve of the railroad track as the train goes east from Eureka and immediately before reaching this crossing, it appears that the Blakey road, as it is called, along which the traction engine and separator were being drawn, runs for 600 feet parallel with and to the south of the tracks of the railroad and after it crosses the tracks runs for a distance of about 1400 feet up an incline to where it crosses the Missouri Pacific tracks. It is evident that persons passing from the Cihak farm, where this machinery had been stored, to cross the road would have a fair view of the track as far up as Eureka, and that they had this view after they crossed the track is shown by the testimony of witnesses in this case who saw the smoke of the approaching en-

Digitized by Google

gine before it reached Eureka. So that so far as the public was concerned this was not a dangerous crossing as there was full opportunity for those traveling along the road to have warning of the approach of any train from Eureka. After the railroad tracks cross the public road they are straight for apparently over a mile and to the crossing of the Meramec river and beyond there to a station called Crescent, which appears to be about three miles east of Eureka. There was no reason therefore to call for a slackening of speed on the part of the engineer of the train, unless we are to hold as a matter of law that speed is to be slackened at all curves and crossings; he had sounded his whistle after leaving Eureka 600 yards east of the crossing, and long enough ahead to have cleared the track of pedestrians or of ordinary travel over it. Nor can it be contended that he had anything to look for but a clear track at this point, certainly had no occasion to anticipate a permanent obstruction of this kind on it.

Whether the speed was excessive was a question of fact. There are cases where, in the absence of a statute or ordinance upon the subject, considered in connection with other circumstances, the court may be justified in declaring as a matter of law that the company was guilty of negligence in running its train at an excessive and dangerous rate of speed under the circumstances of that particular case. Mr. Elliott in his work on Railroads, 3 Elliott, Railroads (2 Ed.), sec. 1160, says: "In the absence of any statute or ordinance upon the subject, no rate of speed is negligence *per se*. . . . Ordinarily, however, the question is one of fact for the jury." See, also, Chicago & Northwestern Railway Co. v. Netolicky, 14 U. S. C. C. A. 615 (67 Fed. Rep. 665), a decision by the United States Circuit Court of Appeals for the Eighth Circuit, the opinion written by Judge Thayer, concurred in by Judges Caldwell and Sanborn. So we have found

Digitized by Google

it treated by all the cases in our state which have been referred to even by industrious counsel for appellant. We are unable to say, as claimed by those counsel here we must, that the rate of speed was, under the circumstances of this case, so excessive as to render its maintenance at that place negligence *per se* and to declare as a matter of law in this case that such was so clearly a matter of negligence on the part of this plaintiff, the engineer, that we should declare that he cannot recover. The burden of proving that this speed rate, pleaded by defendant as a contributing act of negligence, was excessive, was upon defendant. It is uncontradicted that the speed was the usual one for that train at that point; it was called for by the train schedule, apparently; the engineer was running under orders and with notice that the track was clear. He had sounded his whistle; he had no reason to apprehend the presence of such an obstruction.

The remaining ground for claiming that a verdict should have been directed for defendant and its demurrer sustained, is the act of plaintiff in jumping out of the window of his cab when he saw the imminence of colliding with the obstruction across the track. This is claimed as a contributing cause, the burden of sustaining which was also on defendant. To sustain the contention of counsel for appellant, we would have to declare as a matter of law that this act of plaintiff was also negligence *per se*. This we cannot do. Our Supreme Court in Kleiber v. The People's Ry. Co., 107 Mo. 240, 17 S. W. 946, has settled this proposition in our state. It is there said (l. c. 247): "It is as well settled as any other principle of the law of negligence that, if one, by the negligence of another, has been placed in a situation of apparent imminent peril, he is not required, in attempting to escape therefrom, to use the judgment and discretion that is required of him when not dominated by terror of impending danger; and if, without having time to deliberate, and

Digitized by Google

acting upon the instinct of self-preservation, and as a prudent person might be expected to act in the circumstances, he is injured by adopting a dangerous alternative, he may still recover from the one by whose negligence he has been impelled to act. This is true, though no injury would have resulted had no attempt to escape been made." Citing many cases and quoting from others in support of this rule, Judge MACFARLANE concludes, at page 249: "From these decisions the following rules, essential to liability may be deduced: First, the peril or alarm must have been caused by the negligence of the one against whom indemnity is sought; second, the apprehension of peril, from the standpoint of the injured person, must have been reasonable, and, third, the appearance of danger must have been imminent, leaving no time for deliberation. On the other hand the danger must be judged by the circumstances as they appear, and not by the result." See, also, Root v. Kansas City Southern R. Co., 195 Mo. 348, l. c. 356, 92 S. W. 621, and Chicago & Northwestern Ry. Co. v. Netolicky, supra in which passing on a motion for rehearing, Judge Thayer has said (l. c. 624): "We are unwilling to declare, as a matter of law, that a person who is called upon to act under such circumstances, and to act instantaneously, is guilty of negligence if he does not choose the safer course. In such a case the inference of contributory negligence, if it is a justifiable inference, should be drawn by the jury, rather than by the court." In brief our Supreme Court as well as the United States Circuit Court of Appeals declined to say as a matter of law that choosing what appeared to him to be a means of safety in his fright and confusion and that means turning out to be disastrous to him, the plaintiff can be held guilty of contributory negligence. So it has been held and the rule applied in Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 S. W. 675, by this court, and in Hull v. Thomson Transfer

Digitized by Google

Co., 135 Mo. App. 119, 115 S. W. 1054, by the Kansas City Court of Appeals, it being held in the latter case (l. c. 123) that the question as to the act of the plaintiff under the circumstances and as to whether he acted as an ordinarily prudent person might be expected to act under similar circumstances was a question for the jury. We think these cases sufficient to warrant us in declining to hold as a matter of law that plaintiff contributed to his own hurt by jumping from his engine.

Summarizing our conclusions on the facts and the law, we hold that there was evidence to support a verdict either way; ample evidence that would support a verdict for the plaintiff under proper instructions. The jury has found against the defendant; it was properly instructed; that finding has been affirmed by the learned trial judge. On careful consideration of all the testimony in the case and weighing the arguments and consulting the authorities of counsel for appellant, we can arrive at no conclusion but that the judgment of the circuit court should be and it is affirmed. *Nortoni* and *Caulfield, JJ., concur.*

---

## STATE ex rel. GRANITE CITY & MADISON BELT LINE RAILROAD COMPANY et al., Relators, v. WILLIAM B. HOMER, Judge, Respondent.

**St. Louis Court of Appeals. Argued and Submitted December 8, 1911. Opinion Filed March 5, 1912.**

1. **JURISDICTION: Actions: Local or Transitory.** A deed to a railroad company organized under the laws of Illinois, conveying land in Granite City, Illinois, to be used for railroad purposes, contained a covenant, which was to run with the land, imposing on the grantee the duty of switching cars between any industries located on its line in Granite City, for a specified sum, the benefits of such covenant to inure to all industries then located or which might thereafter be located on said

Digitized by Google

line. *Held*, that, as between an owner of an industry on said line in Granite City and the railroad company, there was privity of contract but not of estate, and an action by such owner to enforce the covenant in regard to switching cars was not a suit *in rem* or *quasi in rem*, involving title to land, but was, in effect, a suit for specific performance of a contract for personal services, and hence a circuit court in Missouri, having jurisdiction of the parties, had jurisdiction of the subject-matter of the action.

2. ———: **Equity: Suits Affecting Land in Foreign Jurisdiction.** Courts of equity have the right to operate on persons within their jurisdiction, even though the acts or contracts involved relate to lands situated outside of their jurisdiction.

3. **PROHIBITION: Rules of Decision: Possibilities of Decree of Inferior Tribunal.** The court, in an action to prohibit the circuit court from exercising jurisdiction in a suit by a non-resident corporation against domestic and foreign railroad companies who were alleged to own and operate a line of road in a sister state under one system, to compel them to perform a switching contract by which it is alleged they agreed to switch cars on said line for a certain sum, will not anticipate what decree the circuit court may make, and award the writ on the theory that said court must, to enforce its decree, go into the sister state and undertake to operate the road.

## Original Proceeding for Prohibition.

WRIT DENIED.

*G. T. Priest* for relators.

The preliminary writ heretofore awarded should be made permanent and absolute for the lack of jurisdiction of respondent over the subject-matter in the action pending before him, because said action is local and not transitory in nature, and can be maintained only within the jurisdiction where it arose, which is Granite City, state of Illinois. An action is local: (a) When it is founded upon privity of estate. Lienow v. Ellis, 6 Mass. 231; Clark v. Scudder, 6 Gray (Mass.) 122; Educational Soc. v. Varney, 54 N. H. 376; Bracket v. Alvord, 5 Cow. (N. H.) 18; White v. Sanborn, 6 N. H. 220; New York v. Dawson, 2 Johnson's cases 335; Neill v. Owen, 3 Texas, 145; Eachus v. Trustees,

Digitized by Google

17 Ill. 534. (b) When the facts upon which the cause of action is based are of a local nature and could only have arisen in a particular place or locality. Masson v. Warner, 31 Mo. 508; Cooley on Torts, p. 471; Livingston v. Jefferson, 1 Brock Rep. 209; Railroad v. Orcutt, 16 Gray 17; Eachus v. Trustees, 17 Ill. 535; Gunther v. Dronbauer, 86 Md. 6; Morris v. Railroad, 78 Tex. 17. (c) When the courts of one state refuse to extend the rule of comity and entertain jurisdiction of a cause of action arising in another state when to do so would be to intermeddle with the internal affairs of that state and its public policy. Construction Co. v. Railroad, 135 Mass. 441.

*Seddon & Holland* and *F. C. Sharp* for respondent.

(1) Actions *in rem,* or *quasi in rem,* as they directly affect the title to land, are inherently local. The case of the Stamping Company is neither *in rem* nor *quasi in rem* and does not seek, either directly or indirectly, to affect the title to any land in our out of this state. Livingston v. Jefferson, 1 Brock 203. (2) Personal actions are in their nature transitory and when they are treated as local, it is on account of some arbitrary distinction of the system under which they are prosecuted. In pursuance of such a distinction, in those states which are still governed by the common law system, actions to recover damages for injuries to land are local, and further, by use of the fiction that the breach of a covenant running with the land is an injury to the land itself, the rule has been extended to cover an action by an assignee of such a covenant to recover damages for its breach. This action, based on privity of estate between the plaintiff and defendant, is thus treated as local. But neither the rule that actions for injuries to land are local, nor the application of this rule to actions by an assignee on a cove-

Digitized by Google

nant of title running with land, prevails in this state. Both classes of actions, and *a fortiori,* the latter, are transitory in Missouri. Livingston v. Jefferson, 1 Brock 203; Henwood v. Cheeseman, 3 S. & R. 500; Dennick v. Railroad, 103 U. S. 320; Oliver v. Loye, 59 Miss. 320; Gregg v. Railroad, 48 Mo. App. 494. (3) Though it should be held that the rule of the common law system, that actions by an assignee of a covenant running with land are local, prevail in this state, the case of the Stamping Company would not fall within this rule. (a) It is not founded on a covenant running with land. Tiedeman on Real Property, sec. 147; 1 Washburn on Real Property (6 Ed.), sec. 680; Wood on Landlord and Tenant, p. 672; Hurd v. Curtis, 19 Pick. 459. (b) There is no privity of estate between the plaintiff and any of the defendants, as to any land. Patten v. Potts, 80 Ala. 373; Mygatt v. Coe, 124 N. Y. 212; Pool v. Morris, 29 Ga. 374; Boughton v. Van, 61 N. Y. Supp. 574. (c) The Stamping Company sues as an original covenantee on privity of contract. Wharton on Conflict of Laws, p. 661. (4) The action of the Stamping Company is a suit in equity for the specific performance of a contract of personal service. Suits in equity are and always have been transitory, unless by force of some statute the decree by its own force divests property or directly affects its title. Penn v. Baltimore, 1 Vesey 444; Cranston v. Johnson, 3 Vesey 170; Story on Conflict of Laws, secs. 544-545; Hart v. Sanson, 110 U. S. 151; Massie v. Watts, 6 Cranch 148; Kerr on Injunctions, *8; High on Injunctions, sec. 29; Olney v. Eaton, 66 Mo. 563; State v. Zachritz, 166 Mo. 306; Castleman v. Castleman, 184 Mo. 432; Hewitt v. Price, 204 Mo. 31; State v. Muench, 225 Mo. 210. (5) The suit of the Stamping Company is founded on a plain simple contract of carriage. There is but one question involved, What is the proper construction of the contract?



Digitized by Google

There is no suggestion in the record that the enforcement of this contract will or can conflict with any law or statute of Illinois or any public policy of the state. No authority can be cited for or against so obvious a proposition. The relators have cited none. Neither have we.

STATEMENT.—In an amended petition, filed in the circuit court of the city of St. Louis, the National Enameling & Stamping Company, a corporation, suing the Granite City & Madison Belt Line Railroad Company, hereafter called the Belt Line or Belt Line Company, the Madison, Illinois & St. Louis Railroad Company, the St. Louis Merchants Bridge Terminal Railway Company, and the Terminal Railroad Association of St. Louis, it is alleged that while defendants are organized as separate corporations, they have in fact constituted and been operated as one system prior to December 15, 1900, and ever since; that throughout that time all of the defendant corporations have been owned and controlled—while existing as separate entities only in name—as and under the one system; that in June, 1900, defendant, Terminal Railroad Association of St. Louis, acquired, and still owns, all the stock of the Belt Line Railroad Company; that prior to said time the St. Louis Merchants Bridge Terminal Railway Company had acquired, and still owns, all of the stock of the Madison, Illinois & St. Louis Railway Company, and that prior to that time, the Terminal Railroad Association of St. Louis had acquired, and still holds, a majority of the stock of the St. Louis Merchants Bridge Terminal Railway Company, and that throughout that period the affairs and policies of all of those companies have been determined and controlled by the directors of the Terminal Railroad Association of St. Louis who have, at all times, operated the properties in the interest of that system, and for the use and benefit thereof. And plaintiff states that

Digitized by Google

ever since the 18th day of June, 1911, each of these corporations has been a portion of, and has been operated as a part of a system of terminals owned and controlled by the St. Louis Merchants Bridge Terminal Railway Company, Madison, Illinois & St. Louis Railway Company, Terminal Railroad Association of St. Louis, and the Granite City & Madison Belt Line Railroad Company; that throughout that period none of these corporations have been operated as a separate entity, but that the affairs of all have been directed and controlled by and for the benefit of that system. It is further alleged that F. G. Niedringhaus and others, as trustees, had by warranty deed of date September 15, 1900, conveyed to the Belt Line Company, certain tracts or strips of land in Granite City, Illinois, and certain rights in and easements upon certain tracts or strips of land in that city, to be used for railroad purposes. Describing the property, it is averred that on December 21, 1908, these trustees were also the owners of certain strips of land also located in said Granite City and describing them; that on December 21, 1898, these trustees had entered into an agreement with the American Steel Foundry Company, by which agreement the trustees conveyed the last above described tracts of land to the last named company, and that company, for a valuable consideration, obligated itself, its successors and assigns to construct a railroad track or tracks upon the strip of land described, and that the trustees reserved to themselves in and by said deed, and the American Steel Foundry Company, for a valuable consideration, granted to the trustees, their successors and assigns the perpetual right to use any railroad track built on the strip of land jointly with the American Steel Foundry Company; that by that deed the American Steel Foundry Company did further agree to build, and long prior to September 15, 1900, built tracks upon the strips of land, which tracks the trustees at

Digitized by Google

the time of the execution of the deed of September 15th had a right to use under the covenants and agreements set out in the deed of December 21st. It is further averred that by the deed of September 15, 1900, the trustees had conveyed and granted to the defendant Belt Line Company all the rights, title and interests secured to the trustees by the deed and contract of agreement between the trustees and the American Steel Foundry Company; that by the deed of September 15, 1900, the trustees conveyed, assigned and transferred to the Belt Line Company, its successors and assigns, the perpetual right to use the track so built by the American Steel Foundry Company on the tracts of land so conveyed in the agreement entered into between the trustees and the American Steel Foundry Company, it being averred that the strips of land so conveyed by the deed of September 15th constituted what is termed in that deed the line of the Belt Line Company in Granite City. It is further averred that the last named company accepted the deed and for a good and valuable consideration agreed to fully and faithfully carry out all the agreements and covenants in the deed contained and imposed upon it, and further agreed that all the agreements and covenants in the deed should be binding not only upon the Belt Line Company but upon its successors, lessees and assigns. It is further averred that by the deed of December 15th, the Belt Line Company agreed to operate its line, including the lands, easements, switches, spurs and turnouts previously belonging to it or acquired by it through that deed or subsequently owned, controlled, leased or operated by it, and further agreed that all the benefit to be derived under the above deed should inure not only to the benefit of the industries then existing and located on the line of the Belt Line Company but also to the benefit of any and all industries thereafter to be situated or located on that line of that company, and that the deed

Digitized by Google

was entered into between the trustees and the Belt Line Company for the benefit, not only of the trustees and of the Belt Line, but for the benefit of any and all industries then located on the lines of the Belt Line or that might thereafter be located on that line. It is further averred that by the deed of September 15th, the Belt Line Company covenanted and agreed with the trustees that it would switch loaded cars between the industries located on that line in Granite City for one dollar a car, and that the covenant and agreement should apply to all of the land, rights of way, spurs, switches and turnouts previously owned by the Belt Line or acquired by it by that deed and to all the lands, rights of way, spurs, switches and turnouts that might be subsequently owned, controlled, leased or operated by the Belt Line. Plaintiff further states that (on) the execution of the deed between the trustees and the Belt Line Company, the latter entered into an agreement in the nature of a lease with the St. Louis Merchants Bridge Terminal Railway Company, referred to as the lease of September 15, 1900; that that lease has been in full force and effect ever since the date of making it; that by the terms of that lease the Belt Line Company leased to the St. Louis Merchants Bridge Terminal Railway Company all the strips of land, rights of way, easements, tracks, spurs, switches and turnouts which the Belt Line acquired from the trustees by the deed of September 15th, and that by that lease the St. Louis Merchants Bridge Terminal Railway Company agreed to fully and faithfully perform all of the covenants and agreements imposed upon the Belt Line Company by the deed of September 15th; that is, the St. Louis Merchants Bridge Terminal Railway Company, for a good and valuable consideration, agreed to operate the line of railroad mentioned in the lease of September 15th, and the deed of September 15th, and further agreed that the benefits to be derived under the lease of Sep-

Digitized by Google

tember 15th, should inure not only to the benefit of the industries then existing and located on the line of railroad but also to the benefit of any and all industries thereafter to be situated or located on that line, and that the lease was entered into for the benefit not only of the lessor and lessee but for the benefit of any and all industries then located on the line of the Belt Line Railroad Company or that might thereafter be located on that line, and that by that lease of September 15th, the St. Louis Merchants Bridge Terminal Railway Company covenanted and agreed with the Belt Line Railroad Company that it would switch loaded cars between any industries located on that line in Granite City for one dollar per car, and that that covenant and agreement should apply to all of the lands, lines, etc., owned or controlled by the Belt Line Company at the time of the execution of the lease or that might subsequently be owned, controlled, leased or operated by the Belt Line. It is further averred that at the time of the execution of the deed and of the lease of September 15th, and at all times since that date, plaintiff was engaged and still is engaged in the manufacture of iron and steel products and maintained and is still maintaining a manufacturing industry on the property immediately adjacent to the tract or strip of land designated in the deed of September 15th, as tract No. 2, and that the industry of plaintiff was at that time and is now located on the line of the Belt Line Company in Granite City as hereinbefore described. It is further averred that the American Steel Foundry Company and its successor, the American Steel Foundries Company, are and for many years last past have been corporations engaged in the manufacture of steel products, and that for years prior to the execution of the deed of September 15th, they maintained and ever since that time the American Steel Foundries Company has maintained and still maintains a manufacturing industry on the

Digitized by Google

land immediately adjacent to the tract of land described in the deed and agreement of December 21st, as tract No. 2; that the Granite City Manufacturing Company is now and for years has been a corporation engaged in the manufacture of glucose products and since the time of the execution of the deed of September 15th, and for several years last past maintained and still maintains a manufacturing industry on a tract of land in Granite City immediately adjacent to the strip of land described in the deed and agreement of December 21st; that the plants of the American Steel Foundry Company and its successor and the plant of the Granite City Manufacturing Company have for several years last past been located and are now located on what is designated in the deed and lease as the line of the Belt Line Company in Granite City, and that ever since that time that industry has been and is now located on the line of the Belt Line in Granite City. It is further averred that for many months last past defendants and each of them, in direct violation of the covenants and agreements in the deed and in the lease of September 15th, have insisted upon charging and have charged plaintiff sums in excess of one dollar per car for switching cars between the plant of plaintiff and the plants of the American Steel Foundries Company and Granite City Manufacturing Company, and in violation of the covenants and agreements in the deed and lease persisted in charging plaintiff the sum of three dollars per car for such switching; that when plaintiff paid that charge to defendants it paid it under protest. That in April, 1910, defendants, in violation of the covenants and agreements in the deed and lease of September 15th, refused to switch any loaded cars for plaintiff between its plant and the plants of the American Steel Foundries Company and the Granite City Manufacturing Company or *vice versa,* unless plain-

Digitized by Google

tiff would pay in advance to defendants for such switching the sum of three dollars per car.

It is further averred that plaintiff for years past has, and in the future will have, occasion to switch loaded cars between its plant and the plants of the two companies before named in large numbers, and those companies have had for years past, and in the future will continue to have, occasion to switch loaded cars between their plants and the plant of plaintiff, and that if defendant adhere to their refusal to switch cars between these parties and points except upon payment of the sum of three dollars per car, as plaintiff charges it verily believes defendants and each of them intend and expect to do, unless enjoined by the court, that plaintiff will sustain irreparable injury.

Averring that it has no adequate remedy at law in the premises, plaintiff prays the court to enter a decree that defendant specifically perform for all time in the future, the agreements and covenants contained in the deed and lease of September 15th, to switch loaded cars at the rate of one dollar per car between the points named when requested by plaintiff, and that defendants and each of them be perpetually enjoined from charging plaintiff the sum of three dollars per car or any other sum in excess of one dollar per car for switching loaded cars to and fro between the points, and that they be perpetually enjoined and restrained from refusing to switch cars for the sum of one dollar per car.

There is also a prayer for an injunction *pendente lite.*

Defendants interposed a demurrer to this amended petition, assigning among other grounds of demurrer that the circuit court of the city of St. Louis, Missouri, was without jurisdiction in that the alleged cause of action is a proceeding *in rem,* local in nature, founded upon covenants running with land, the land located in a foreign state; that the venue of the alleged cause

Digitized by Google

of action is wholly within a jurisdiction foreign to the court and the state of Missouri, and that the alleged cause of action attempts to control the operation of a railroad wholly within the jurisdiction of a foreign sovereign power, to-wit, the state of Illinois. The demurrer was overruled, whereupon defendants in the suit presented to the judges of this court in vacation, an application for an alternative writ of prohibition prohibiting the Honorable William B. Homer, presiding as judge over the court in which the cause was pending, as judge of that court, from exercising any further jurisdiction in the matter set out in the amended petition of plaintiff in the case mentioned, and that that judge be required to show cause, if any he has, why the writ of prohibition should not be made permanent. In the application for the writ two clauses in the deed of September 15th, before referred to, are set out, namely:

"First: Said grantee shall switch loaded cars between any industries on its line in Granite City for one dollar ($1) per car, and shall switch empty cars free of charge which shall have been handled by said grantee, loaded, and for which its said charge of one dollar ($1) per car has been paid.

"Fifth: The covenants herein imposed on said grantee are hereby declared to be covenants running with the land and being on said grantee, its successors, lessees and assigns, and in the event of any breach of any covenants set out in this indenture, said grantee shall be liable to the injured party in an action at law or in equity and the benefits to be derived hereunder shall inure to the interests of the industries hereafter to be located, as well as the industries now situated, on the railway of said grantee in said Granite City."

In the petition for the writ of prohibition it is admitted that the Terminal Railroad Association of St. Louis, and the St. Louis Merchants Bridge Ter-

Digitized by Google

minal Railway Company are corporations duly organized, incorporated and existing under the laws of the state of Missouri, and that plaintiff in the case and the other two defendants are Illinois corporations.

An alternative writ of prohibition was issued out of this court, to which the Honorable Circuit Judge made a return, which, in effect, is a demurrer to the averments in the application for the writ. Among the reasons stated are that the petition shows on its face that the sole ground why the writ of prohibition prayed for should issue is that it is averred that the circuit court of the city of St. Louis has no jurisdiction to hear and determine the subject-matter of the breach of the covenant, the benefit of which inured to the plaintiff by reason of privity of estate in land in the state of Illinois and of the running of the covenant with the land, and which ground, it is averred in the return, is wholly insufficient in law. Other grounds are that while it is averred in the petition for the writ, that the subject-matter of the suit is a breach of the covenant by reason of privity of estate in land in Illinois and the running of the covenant with the land, yet the petition of the relator itself shows that that covenant is not one running with the land and does not inure to the National Enameling & Stamping Company by virtue of privity of estate or the ownership of any land in Illinois or elsewhere. The final paragraph of the return sets up that the petition for the writ shows on its face that by the petition in the cause, plaintiff therein is seeking to enforce a certain covenant set out in that petition and which is the subject-matter of the suit under the claim that the covenant was made for plaintiff by description in the deed of Niedringhaus and others, as trustees, to the Granite City & Madison Belt Line Railroad Company, and that defendants have bound themselves by express agreements and covenants to perform said cove-

Digitized by Google

nants and that they have breached the covenant and the petition shows that the circuit court of the city of St. Louis acquired jurisdiction of the persons of defendants.

REYNOLDS, P. J. (after stating the facts).—We are aided in the determination of the cause by elaborate arguments by counsel for the respective parties and by briefs which they have since submitted. The points made by counsel for relator are that the preliminary writ heretofore awarded should be made permanent and absolute for the lack of jurisdiction of respondent, as the judge of a circuit court of the state of Missouri, over the subject-matter in the action pending before him because the action is local and not transitory in nature and can be maintained only in the jurisdiction where it arose, which it is alleged is in Granite City, in the state of Illinois. It is also argued that an action is local, first, when it is founded upon privity of estate; second, when the facts upon which the cause of action is based are of a local nature and could only have arisen in a particular place or locality; and third, when the courts of one state refuse to extend the rule of comity and entertain jurisdiction of the cause of action arising in another state, when to do so would be to intermeddle with the internal affairs and public policy of that state.

Counsel for respondent in support of the return and as reasons why the alternative writ should be quashed, argue that actions *in rem* or *quasi in rem*, as they directly affect title to land, are inherently local, but, it is argued, the case before the court is neither *in rem* or *quasi in rem* and does not seek either directly or indirectly to affect the title to any land in or out of this state. The further point is made that personal actions are in their nature transitory, and when they are treated as local, it is on account of some arbitrary distinction of the system under which they

Digitized by Google

are prosecuted, but, it is argued, that neither the rule that actions for injuries to land are local, nor the application of this rule to actions by an assignee on a covenant of title running with the land, prevails in this state; that both classes of actions, and *a fortiori,* the latter, are held to be transitory. It is further argued that even if it should be held that the rule of the common law, that actions by an assignee of a covenant running with land are local, prevails in this state, the case at bar would not fall within this rule, for it is not founded on a covenant running with land; there is no privity of estate between plaintiff and any of defendants as to the land; the Stamping Company sues as an original covenantee on privity of contract. It is further contended that this action of the Stamping Company is a suit in equity for the specific performance of a contract for personal service; that such suits in equity are and always have been transitory unless, by force of some statute, the decree, by its own force, divests property or directly affects its title; finally, that the suit of the Stamping Company, plaintiff is founded on a plain, simple contract of carriage; that there is but one question involved, namely, what is the proper construction of the contract; that there is no suggestion in the record that the enforcement of this contract will or can conflict with any law or statute of Illinois or any public policy of that state, it being asserted by counsel for respondent that "no authority can be cited for or against so obvious a proposition. The relators have cited none. Neither have we."

Counsel for the respective parties have submitted a vast array of authority in support of their several propositions, all of which will doubtless appear in the official report of the case. We have given them careful consideration and without attempting to take up and analyze each of the authorities cited in detail, will content ourselves in the disposition of the case

Digitized by Google

with a brief reference to the authorities by which we are guided in arriving at our conclusion. We may say at the outset that we agree with counsel for respondent that the case at bar is neither *in rem* nor *quasi in rem* and does not seek either directly or indirectly to affect the title to any land in or out of this state. We further agree that the proposition made by those counsel, that this action is not founded on a covenant running with the land; that there is no privity of estate between plaintiff and any of defendants as to any land and that the Stamping Company sues as an original covenantee on privity of contract. As we view the case, it is a suit in equity for specific performance of a contract for personal services; a contract of carriage; the question involved is the proper construction, and then a decree for the performance, of a personal contract. That, we think, is the trend of the authorities cited by counsel for respondent and we refer to them in support of these propositions.

Counsel for each of the parties to the cause refer in support of their respective positions to Livingston v. Jefferson, a decision by Chief Justice John Marshall, on circuit, reported 1 Brock. 203. That case, an action at law, while instructive as to the law concerning the distinction between local and transitory actions, and entitled to the profound respect always accorded to any decision of the great lawyer and Chief Justice who delivered it, does not meet this case.

Learned counsel for relators refer us to Mason v. Warner, 31 Mo. 508, calling attention to that case as defining the difference between local and transitory actions. That was an action at law, and practically rests on Livingston v. Jefferson, supra. Even in that case, however, it is to be noted that the Supreme Court overruled the circuit court, which had sustained a demurrer to the petition in the case, that demurrer bottomed upon the ground that the injury, for recovery of damages for which the action was brought, had

Digitized by Google

occurred in the Mississippi river, outside the limits of the state of Missouri, at a bridge over that river between the states of Illinois and Iowa. As far as it is in point here, it hardly sustains relator's contention. These cases must be read with reference to our present local statutes and rules of decisions; especially their application to the case at bar can only be made with due allowance between the distinction between actions at law and suits in equity.

The right of courts of equity to operate on persons within their jurisdictions, even when the acts or contracts of those persons relate to lands, has been very often determined affirmatively by our own courts and those of other jurisdictions and is recognized by all text-writers.

Mr. Justice Story says that it may be proper to premise "that a bill for a specific performance of a contract respecting land may be entertained by courts of equity, although the land is situate in a foreign country, if the parties are resident within the territorial jurisdiction of the court. The ground of this jurisdiction is that courts of equity have authority to act upon the person: *'Aequitas agit in personam.'* And although they cannot bind the land itself by their decree, yet they can bind the conscience of the party in regard to the land, and compel him to perform his agreement according to conscience and good faith." [2 Story's Equity Jurisprudence (13 Ed.), par. 743, top page 60.] The same author says, sections 1292, top page 632: "Courts of equity will in all other cases where the proper parties are within the territorial sovereignty, or within the reach of the territorial process, administer full relief, although the property in controversy is actually situate in a foreign country, unless indeed the relief which is asked is of a nature which the court is incapable of administering." The same learned author in his commentaries on the "Conflicts of Laws," section 544, top page 759 (8 Ed.),

Digitized by Google

reiterates this doctrine, emphasizing and illustrating by authority the proposition that a court of equity, called upon to act with respect to lands situate in a jurisdiction foreign to that court, "cannot act upon the land directly, but acts upon the conscience of the person living" (within the jurisdiction of the court).

A more modern authority, Bispham's Principles of Equity (6 Ed.), p. 66, par. 47, lays down as the eleventh maxim in equity and as affecting its jurisdiction, that, "Equity acts *in personam*. It was against the *person* that the jurisdiction of the court of chancery was originally acquired, and an attachment against the person has always been, and still is, one of the ordinary means of enforcing obedience to its decrees. Indeed, it may be said that, 'generally, if not universally, equity jurisdiction is exercised *in personam* and not *in rem* and depends upon the control of the court over the parties by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought.' Hence, when the parties are within the jurisdiction of a court of chancery, it will not, ordinarily, hesitate to grant relief, although the property to be ultimately affected by the decree might lie in another forum."

In State ex rel. South Missouri Pine Lumber Co. v. Dearing, 180 Mo. 53, 79 S. W. 454, it is laid down in the first place, that in acting on an application for writ of prohibition the court will not consider the merits of the action, the proceedings in which are sought to be prohibited; that an action to restrain the foreclosure of a deed of trust and to cancel the notes secured thereby, is an action *in personam* and may be brought in other counties than that in which the land lies; that such an equitable action is not one affecting title to real estate within the meaning of the statute which confers exclusive jurisdiction in actions of that character on courts of the county in which the real estate is situate. It is further held that the

Digitized by Google

jurisdiction of the court is not to be determined by the prayer for relief but on the facts as constituting the cause of action.

In Castleman v. Castleman, 184 Mo. 432, 83 S. W. 757, a suit in equity to set aside two deeds of trust, the suit was brought in the county in which the land sought to be affected was situate, but defendant was residing in another county in the state, being brought into the suit by service of summons in the county of his residence. The defendant raised the question of jurisdiction and moved the court to dismiss the suit on the ground that the circuit court of the county in which the land was situated and in which the action was brought had no jurisdiction. The Supreme Court, passing upon this, held that the general proposition that a court of equity acts *in personam* was correct; it further held that since the suit under consideration was personal in its character, it must seek the person to be affected in the county of his residence, regardless of where the thing in controversy may be, but that this was subject to one exception, an exception created by what was section 564, Revised Statutes 1899, now section 1853, Revised Statutes 1909, that section providing that suits for the possession of real estate or whereby the title thereto may be affected, shall be brought in the county in which such real estate or some part thereof is situate. It will be noted that this provision is in somewhat different language from that employed in section 12, article 6, of our Constitution, conferring exclusive jurisdiction upon the Supreme Court "in cases involving title to real estate." As to this constitutional provision, our Supreme Court has said in many cases that to give that court appellate jurisdiction, title to real estate must be directly involved, not merely affected. [For illustration see Hewitt v. Price, 204 Mo. 31, l. c. 44, 102 S. W. 647.] This case of Hewitt v. Price, illustrates the broad view which our Supreme Court takes of

Digitized by Google

this matter, referring for support of its position to Massie v. Watts, 6 Cranch., l. c. 158 and Olney v. Eaton, 66 Mo. 563. In each of these cases, as also in Hewitt v. Price, although the case, as originally brought, involved title to real estate, our Supreme Court held that when the answer by way of cross bill or counterclaim has set up a contract as to the title to these same lands, that the court had jurisdiction; that while decrees of courts of equity, primarily and properly act *in personam* and, at most, collaterally only *in rem*, the specific performance of a contract for the sale of lands lying in a foreign country will be decreed in equity, whenever the party defendant is a resident within the jurisdiction of the court.

In State ex rel. Gavin v. Muench, Circuit Judge, 225 Mo. 210, 124 S. W. 1124, our Supreme Court had before it the question of whether the circuit court of the city of St. Louis had jurisdiction and authority to try and adjudicate the matters and things involved in the suit. The case was an application for a prohibition against the circuit judge. Judge Woodson, delivering the opinion, says (l. c. 228) the question is not whether the circuit court had correctly decided the case but whether the court had jurisdiction over the subject-matter of the suit. It appeared that the title to real estate situate in St. Louis county, a county outside the jurisdiction of the judge of the circuit court of the city of St. Louis, was involved. The learned judge, in discussing the question of jurisdiction, cites most of the cases we have before referred to, and quoting extensively from State ex rel .v. Dearing, supra, holds that because the remedy sought, the question in judgment, directly involved the title to real estate in St. Louis county, the circuit court of the city of St. Louis had no jurisdiction. See, also, Fulton v. Fisher, ——Mo. ——, 143 S. W. 438, l. c. 443, not yet officially reported, in which it is held that



Digitized by Google

"suits in equity are proceedings *in personam*. Therefore, when the court lawfully acquires jurisdiction of the persons, it may adjudicate their property rights regardless of where the property is situated." This was in a suit concerning interests in lands in Ohio.

This is the last case in which our Supreme Court has considered this matter except that in the case of State ex rel. Pacific Mutual Life Insurance Co. v. Grimm, Circuit Judge, 239 Mo. 135, decided at the October, 1911, term of our Supreme Court, a very elaborate discussion as to the distinction between local and transitory actions is indulged in. This decision is not particularly in point in the case at bar except confirming what we have before said and holding that the action then before the Supreme Court was transitory and not local.

McCune v. Goodwillie, 204 Mo. 306, 102 S. W. 997, is a case in which was involved a decree of a court in the state of Ohio, in a suit in equity brought in that court, in which it was adjudged by the Ohio court that certain deeds and transfers made by one party to another, and covering lands in Missouri, were void. Our Supreme Court (l. c. 336) held that the parties to the Ohio suit had had their day in a court of equity having jurisdiction of their persons. That court had jurisdiction of the subject-matter, which involved the construction of a will and execution of deeds thereunder, and that court could bind and did bind the conscience of everybody to that suit. Says Judge LAMM, who delivered the opinion of our Supreme Court, "While the decree could not directly affect the bare legal title to land in Missouri, yet it could and did conclude all parties on every issue in that case."

A like rule prevails in the state of Illinois, in which state the railroad line here involved is situate. The Supreme Court of Illinois, in Garden City Sand Co. v. Miller, 157 Ill. 225, had before it a contract in-

Digitized by Google

volving title to land situate in Michigan, that contract made in Michigan, and the Illinois Court recognized the Michigan decree entered upon against these parties, and enforced it in Illinois as against the parties who were found, served and appeared in the Illinois court.

The case nearest in line with the contention of the learned counsel for relators as to why the circuit court of the city of St. Louis should not entertain jurisdiction of this case, is Kansas & Eastern Railroad Construction Co. et al. v. Topeka, Saline & Western Railroad Co. et al., 135 Mass. 34. An examination of the statement of facts and the opinion in that case, however, demonstrates the inapplicability of the decision there reached to the facts in the case at bar. There the court was practically asked to enter upon the construction and supervision of the construction of a railroad in the state of Kansas.

The learned counsel for the relators insist that the circuit court of the city of St. Louis should not entertain jurisdiction of this cause because it might be necessary, in order to completely enforce its decree, to go into the state of Illinois as in that state the service is to be performed.

There are several answers to this. In the first place, it appears, not very clearly it is true, by the petition in the original suit, but by admission of counsel at the bar, that these car service charges—switching charges, etc., are collected by the Terminal Association in St. Louis, that being the party successor to or in control of all the other defendants, as we understand it. We may say in passing that the petition in the case at bar should be made more definite both as to where and by whom the service charges are collected, and as to the corporate residence of the several defendants which, while the latter, appears by the petition for prohibition, does not appear in the petition in the original suit. In the next place, we

Digitized by Google

cannot anticipate what decree or judgment the circuit court of the city of St. Louis may make in the case. It will hardly undertake to operate the road in Illinois. All that it will determine will be whether there is a contract rate to which defendants are bound. If it so finds, it has before it, in this case, the corporations which, in violation of contract, are enforcing it and we anticipate no difficulty on the part of the circuit court of the city of St. Louis in enforcing against these defendants performance of the contract obligations. It will be time enough to consider the power of that court to do that when a decree is rendered, if one is rendered, for the plaintiffs in the original suit. It may even happen that such a decree would be rendered as would take the case, not to our court, but to the Supreme Court. It may further be said that if title to real estate is involved in this suit, as contended for by the learned counsel for relators, this whole proceeding in the application to us by relators for a writ of prohibition is beyond our jurisdiction. But we do not take this latter view of the case for the reasons before given. We have entertained and do entertain jurisdiction of the cause and leave it with the circuit court of the city of St. Louis on the ground that its determination does not involve title to real estate.

Our conclusion is, that the preliminary writ of prohibition, heretofore issued; was improvidently issued and should be vacated and the petition for prohibition be denied. It is so ordered. *Nortoni* and *Caulfield, JJ.*, concur.

Digitized by Google

HERMAN B. ANDERSON, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted October 4, 1911. Opinion Filed March 5, 1912.

The opinion of the Springfield Court of Appeals in this case (149 Mo. App. 266) is adopted as the opinion of the court.

Appeal from Stoddard Circuit Court.—*Hon. J. L. Fort,* Judge.

REVERSED AND REMANDED.

*W. F. Evans, W. J. Orr* and *J. H. Orr* for appellant.

*Wilson Cramer* for respondent.

PER CURIAM.—This case was originally appealed to the Supreme Court from a judgment of the circuit court of Stoddard county in favor of plaintiff. Afterwards by reason of the increase of the jurisdiction of the Courts of Appeals the Supreme Court transferred it to this court, from which it was transferred to the Springfield Court of Appeals where the judgment of the circuit court was reversed and the cause remanded. The opinion of the Springfield Court of Appeals will be found under the title Anderson v. St. Louis & S. F. R. Co., 149 Mo. App. 266, 130 S. W. 82. The Supreme Court having subsequently held that all proceedings in the Springfield Court of Appeals on cases so transferred were null, the cause was sent back to this court and has been duly submitted to and argued before us.

Digitized by Google

On consideration of the evidence in the case we have concluded that the statement of facts made and conclusions of law reached by the Springfield Court of Appeals when the case was supposed to be within its jurisdiction are correct. We adopt them as announced by Judge Cox and reported as above as the statement of facts and opinion of our court.

The judgment of the circuit court of Stoddard county is accordingly reversed and the cause remanded to that court. All concur.

---

## LUTESVILLE MILLING COMPANY, Respondent, v. GEORGE H. HUNT, Defendant; D. I. BLOOM, Garnishee, Appellant.

**St. Louis Court of Appeals, March 5, 1912.**

1. **JURY: Waiver: Sufficiency of Record Entry: Trial Practice.** A record entry recited that, "this cause coming on to be heard, comes now the plaintiff by its attorney, . . . and the garnishee . . . by his attorney, and this cause is now taken up and submitted to the court," and also recited the overruling of a motion by the garnishee to "set aside the submission of this cause to the court and submit the same to a jury," on the ground that the cause "has already been submitted and said motion is filed out of time." *Held*, that, under section 1970, Revised Statutes 1909, providing that a waiver of a jury trial may be by oral consent entered on the minutes, said entry showed such waiver by the garnishee.

2. ———: ———: **Withdrawal of Waiver: Trial Practice.** It is not error to refuse to permit a party to withdraw his waiver of a jury and submit the case to a jury, after substantial progress has been made in the trial of the case before the court.

Appeal from Scott Circuit Court.—*Hon. Henry C. Riley*, Judge.

AFFIRMED.

Digitized by Google

*J. R. Young* for appellant.

The issue of fact for the recovery of money or property must be tried by a jury unless a jury is waived in proper manner. R. S. 1909, secs. 1968, 1970; Scott v. Young, 113 Mo. App. 46; Briggs v. Railroad, 111 Mo. App. 175; Brown v. Railroad, 69 Mo. App. 418. Either the judgment or the minutes of the clerk must show that the right of trial by jury was waived. Brown v. Railroad, 69 Mo. App. 418. The issues raised by denial to garnishee's answer shall be tried as ordinary issues between plaintiff and defendant. R. S. 1909, sec. 2431.

*M. Arnold* and *Frank Kelly* for respondent.

Garnishee waived a trial by jury as shown by the record entry which recites: "Now, on this day this cause coming on to be heard comes the plaintiff by his attorney, M. Arnold, and the garnishee, D. I. Bloom by his attorney, and this cause is now taken up and submitted to the court upon the answer of D. I. Bloom" etc. That record shows a jury was waived by one of the ways pointed out by the statute. Bruner v. Marcum, 50 Mo. 405; Paving Co. v. O'Brien, 128 Mo. 277; Drainage Dist. v. Campbell, 154 Mo. 151; Railroad v. Townsite Co., 103 Mo. 451; Bank v. Howell, 79 Mo. App. 318; Gower v. Moore, 52 Mo. 118; Monroe City v. Bank, 40 Mo. App. 367; Sanders v. Wertz, 44 Mo. App. 496; State ex rel. v. Pulliam, 104 Mo. App. 94.

CAULFIELD, J. — Appeal from a judgment against a garnishee. Appellant, the garnishee, assigns only one error, viz., that "the court erred in refusing to submit the issues in the cause to a jury." No bill of exceptions was presented or filed and we can consider the question only as it is presented by the record proper. There we find a recital that "now on

Digitized by Google

this day (October 26, 1909) this cause coming on to be heard, comes the plaintiff by its attorney, M. Arnold, and the garnishee, D. I. Bloom, by his attorney, and this cause is now taken up and submitted to the court" etc. It also there appears that on the next day and after the taking of testimony had commenced and during the progress of the trial, the court overruled a motion made by the garnishee "to set aside the submission of this cause to the court and submit the same to a jury," the record stating as a reason for the court's action in overruling said motion that the cause "has already been submitted and said motion is filed out of time." In our opinion the only question presented is whether the parties waived a trial by jury. The statute (section 1970, Revised Statutes 1909) provides that such waiver may be "by oral consent in court, entered on the minutes." Now the record entry before us can be construed to mean nothing else than that the cause coming on for hearing, the parties appeared and submitted the case for trial to the court; and in at least three instances it has been held that a record entry to that effect was sufficient to show the waiver of a trial by jury. [Bruner v. Marcum, 50 Mo. 405; Tower v. Moore, 52 Mo. 118; Paving Co. v. O'Brien, 128 Mo. App. 267, 107 S. W. 25.] On the authority of those cases we hold that the record entry before us is sufficient for that purpose. We are also of the opinion that the trial court cannot be convicted of error for having refused to permit the garnishee to withdraw his waiver and have a jury after substantial progress had been made in the trial of the case before the court, a jury having been waived when the case was first called for trial.

The judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

Digitized by Google

# STATE ex rel. WILLIAM KANE, Plaintiff in Error, v. KNIGHTS OF FATHER MATTHEW et al., Defendants in Error.

**St. Louis Court of Appeals, March 5, 1912.**

**FRATERNAL BENEFICIARY ASSOCIATIONS: Right to Restrict Beneficiaries to Certain Classes: Statute.** Section 7109, Revised Statutes 1909, which provides that, "Payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon, the member," does not require fraternal beneficiary associations to change the beneficiary in a policy, at the instance of insured, to a person embraced within one of the specified classes but who is forbidden to be a beneficiary under the by-laws of the association; and such associations may provide by their by-laws that beneficiaries shall be confined to persons belonging to any one or more of the classes specified by the statute and that persons belonging to any of the others of such classes shall be excluded.

Error to St. Louis City Circuit Court.—*Hon. Daniel D. Fisher,* Judge.

AFFIRMED.

*Lee A. Hall* for plaintiff in error.

(1) Neither the member of these benefit associations working under the lodge system nor their beneficiaries have any vested interest in the fund or the certificate prior to the death of the member. Westerman v. Supreme Lodge, 196 Mo. 670; Wells v. Mutual Ben. Assn., 126 Mo. 630; Sullivan v. Knights of Father Matthew, 73 Mo. App. 43; Masonic Ben. Assns. v. Bunch, 109 Mo 560. (2) Persons who are members of these orders working under a lodge system are entitled to designate persons included in any of the classes of persons designated by our statute (Sec. 7109) as beneficiary under their certificate. Legion

Digitized by Google

of Honor v. Niedlet, 81 Mo. App. 598; Koerner v. Grand Lodge, 38 Mo. App. 543; Denis v. M. B. A., 119 Mo. App. 210. (3) And this without regard to whether or not the act of 1907 (section 1, Laws 1897, page 132, now section 7109, R. S. 1909) was or was not accepted by such fraternal order working under the lodge system, though organized under the fraternal laws of Missouri prior to the passage of said act. Legion of Honor v. Niedlet, 81 Mo. App. 598; Hertsberg v. Brotherhood, 110 Mo. App. 328; Koerner v. Grand Lodge, 38 Mo. App. 543; Baltzell v. M. W., 98 Mo. App. 153; Lloyd v. W. of W., 113 Mo. App. 19. (4) Respondent order is a fraternal order working under the lodge system. Smith v. Knights of Father Mathew, 36 Mo. App. 184. (5) Mandamus is the proper remedy to compel the issuance of a new certificate to relator payable to the beneficiary designated by him. Lysart v. O. S. Assn., 55 Mo. App. 538; State ex rel. Campbell v. Cramer, 96 Mo. 75; Lloyd v. W. O. W., 113 Mo. App. 19; Legion of Honor Niedlet, 81 Mo. App. 598.

*O'Neill Ryan for* defendant in error.

The respondent, although having the right to extend its beneficiary class to the full limit provided for by Section 7109, Revised Statutes 1909, and not having the right to go beyond that limit, is not obliged to so extend. The relator must designate as his beneficiary a person occupying a relation within the scope and purpose of the society. Westerman v. Supreme Lodge, 196 Mo. 670; Lloyd v. M. W. of A., 113 Mo. App. 19; Pauley v. M. W. of A., 113 Mo. App. 437; Dennis v. M. B. of A., 119 Mo. App. 210; Armstrong v. M. B. of A., 132 Mo. App. 171.

CAULFIELD, J.—Proceeding on writ of error. Error is assigned to the action of the trial court in denying a peremptory writ of mandamus compelling

Digitized by Google

the respondents, a fraternal beneficiary association and its proper officers, to permit the relator, a member in good standing, to change the beneficiary named in his benefit certificate to one, who, though a blood relative within the meaning of the statute (R. S. 1909, Sec. 7109), is not a member of his family or dependent upon him within the meaning of the laws of the respondent association. Such laws contemplate that the assessment of its members shall be for the sole purpose of providing for the "family or the dependent" of deceased members, and that no one shall be named or substituted as beneficiary in any benefit certificate except one who is of the family of the member or dependent upon him. The statute and the laws of the association were as herein indicated, both at the time relator became a member of the association and at the time he sought to change his beneficiary.

Respondent contends that the relator had no right, contrary to the laws of the association, to change his beneficiary to one not a member of his family and not dependent on him, and therefore that it should not be compelled to permit such a change to be made. Relator contends that notwithstanding the laws of the association forbid, he had the right to change his beneficiary to a blood relative within the meaning of the statute because the statute is mandatory and governs and overrides the laws of the association in that respect. The statute, so far as it concerns this appeal, reads as follows:

Section 7109. Fraternal Beneficiary Association, What is—Government of—Benefit Fund—Benefits, to be Paid to Whom.—A fraternal beneficiary association is hereby declared to be a corporation, society or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each association shall have a lodge system, with ritualistic form of work, and representative form of government, and shall

Digitized by Google

make provisions for the payment of benefits in case of death, and may make provisions for the payment of benefits in case of sickness, temporary or permanent physical disability, either as the result of disease, accident or old age: Provided, the period in life at which payment of physical disability benefits on account of old age commences shall not be under seventy years, subject to their compliance with its constitution and laws. The fund from which the payment of such benefit shall be made, and the fund from which the expenses of such association shall be defrayed, shall be derived from assessments or dues collected from its members. *Payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member.* Such association shall be governed by this article, and shall be exempt from the provisions of the insurance laws of this state, and shall not pay a corporation or other tax, and no law hereafter passed shall apply to them unless they be expressly designated therein."

We have italicized the particular language which relator relies upon for his alleged right. We do not regard this language as being intended to compel fraternal beneficiary associations to so *extend* their operations as to provide benefits for *all* the classes designated. It is true that the use of the word "shall" indicates a command, but the use of the word "or" as a connective of the classes designated shows that the command is in the alternative, and leaves it optional as to which of such classes shall be made beneficiaries. In order to comply with such a command, alternative as it is, the association need not stand ready to pay benefits to all the classes designated, but it is sufficient if it provides for such payment to any one of such classes, excluding all the others from the scope of its benevolent operations. We are the more inclined to this view because we look upon the command in

Digitized by Google

question as being a restrictive command. Such associations are exempted from certain burdens, which are imposed on old line insurers, because they are more restricted in their insurance operations. They are permitted to do only a limited kind of insurance. Among the limitations placed upon them in this respect is this one, that their "payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon the member." They must not issue certificates naming beneficiaries outside of these classes. If they do they become liable on such certificates as old line companies and may lose the right to do business as fraternal associations. If they observe the restrictions imposed they are given the coveted exemptions. Now if, in using this language, it was the purpose of the Legislature to restrict the field of operations of these associations, as we conclude it was, then it is manifest that the same language ought not to be construed to forbid them from further narrowing such field of their own volition. The same language ought not to be construed to restrict and at the same time to forbid restriction, unless the intention to do both is manifest. Here such intent to forbid is negatived by the language used, for, as we have observed, it commands, not that the payment of benefits shall be to all the classes designated, but that it shall be to one or another or one or more of such classes. Relator's construction of the statute, if adopted by us, would drive out of the insurance business all fraternal beneficiary associations refusing to provide for affianced husbands, affianced wives, and blood relatives, even of a remote degree, for these are among the classes designated, and relator contends that provision must be made for all. We cannot believe that these three classes are such favorites of the law that the Legislature intended to force provision for them by such drastic measures. Surely such unusual solici-

Digitized by Google

tude for affianced husbands would be clearly expressed, and it is not clearly expressed here. To the contrary, as we have said, the language negatives the idea.

We are of the opinion that the Legislature intended to confine these associations to the classes of beneficiaries designated, but not to compel them to provide for all of them. The decision in the case of Supreme Council L. of H. v. Neidlet, 81 Mo. App. 598, and the other cases cited by the relator are not in conflict with these views.

The judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

---

MARGARETTE W. TORREYSON, Respondent, v. UNITED RAILWAYS COMPANY OF ST. LOUIS, Appellant.

St. Louis Court of Appeals, March 5, 1912.

1. **EVIDENCE: Action for Personal Injuries: Expert Testimony: Physicians: Invading Jury's Province.** In an action for personal injuries, testimony by a physician that plaintiff was suffering from "traumatic neuritis" and that she was suffering from a nervous condition due to a bodily injury, such condition being usually termed a "traumatic neurosis," was not incompetent as invading the province of the jury, since it was merely a statement of the nature and character of plaintiff's ailment, and did not suggest the particular cause thereof.

2. **———: ———: Physical Ability of Plaintiff: Trial Practice: General Objections.** In an action for personal injuries, evidence that plaintiff, before being injured, kept house for her father and was the main dependence and that she was a faithful daughter and stayed with and kept house for her father, mother and aunt, had some bearing on the question of her physical ability prior to the injury, and was admissible as against a general objection for immateriality.

Digitized by Google

3. **TRIAL PRACTICE: Misconduct of Counsel: Curing Error.** In an action against a street railroad company, plaintiff's counsel, in his opening argument, referred to great corporations, great millionaires, and great things, in connection with his claim for $35,000 damages. On objection, the court said there was no evidence to support such a statement, and directed counsel to keep within the record, stating that he did not know what millionaires had to do with the case, that the statement was highly improper, and the purpose apparent, and directed counsel to proceed. *Held*, that the court's remarks and admonition were sufficient to cure the error.

1. **APPELLATE PRACTICE: Misconduct of Counsel: Review: Sufficiency of Exception.** Alleged misconduct of counsel in argument cannot be reviewed in the absence of an exception to the ruling of the court thereon; a statement by objecting counsel, "I except to that remark" (meaning that he *objected*), on which objection the court ruled that counsel should proceed with his argument, followed by a statement by objecting counsel, "I submit that the court should rebuke counsel for making that remark," not being sufficient to preserve an exception to the ruling.

5. ———: ———: ———: **Sufficiency of Objection.** An objection to alleged improper remarks of counsel which does not point out the specific statement complained of and does not call the attention of the trial court to the specific grounds upon which it is based is insufficient; and hence an objection in the form, "I except to that statement," made by defendant's counsel at the end of a series of statements by plaintiff's counsel in argument, was insufficient.

6. **INSTRUCTIONS: Assumption of Disputed Facts.** In an action for personal injuries, the court charged that, if the jury found for plaintiff, they should consider such reasonable sums, if any, as plaintiff necessarily paid out for medical treatment and hospital charges, on account of her injuries; the bodily pain and suffering, and mental anguish endured by her resulting from the injuries received; the character and extent of her injuries, and whether they were permanent; the extent, if any, which she had been prevented by reason of such injuries from working and earning a livelihood; and if her injuries were reasonably certain to cause her pain and anguish in the future and to impair or lessen her ability to work or labor, such facts should be taken into consideration also; and if they found for her, they should find in such sum as in their judgment, under all the evidence, would reasonably compensate her for the injuries received, not to exceed the sum named in the petition, etc. *Held*, not erroneous as assuming either that plaintiff was injured or that she had endured bodily pain and suffering and mental anguish.

Digitized by Google

7. ———: ———. Where, in an action for personal injuries, there was evidence tending to show that plaintiff was bruised and injured to such an extent that she must have endured some bodily pain and mental anguish, and an instruction submitting the question of liability made the return of a verdict for plaintiff conditional upon a finding that she had been bruised and injured, it was not error for the court to assume, in the instruction on the measure of damages, that plaintiff had suffered bodily pain and mental anguish.

Appeal from St. Louis City Circuit Court.—*Hon. Matt G. Reynolds,* Judge.

AFFIRMED. CERTIFIED TO SUPREME COURT.

*Boyle & Priest, Morton Jourdan* and *T. E. Francis* for appellant.

*L. P. Crigler* and *Barclay, Fauntleroy & Cullen* for respondent.

STATEMENT.—The appeal in this case was prosecuted to this court, but was thereafter transferred by it to the Springfield Court of Appeals under the provisions of an act of the Legislature, approved June 12, 1909. [See Laws of Missouri 1909, p. 396; see, also, Sec. 3939, R. S. 1909.] In due time the cause was disposed of by the Springfield Court of Appeals through an opinion prepared by Judge Cox of that court, as will appear by reference to Torreyson v. United Rys. Co. of St. Louis, 144 Mo. App. 626, 129 S. W. 409. Subsequently, the Supreme Court declared the said legislative act, which purported to authorize the transfer of cases from this court to the Springfield Court, to be unconstitutional. The cause was thereafter transferred by the Springfield Court of Appeals to this court on the theory that the jurisdiction of the appeal continued to reside here and the proceedings had in the Springfield Court with reference thereto were *coram non judice.*

Digitized by Google

The case has been argued and submitted here, and upon due consideration, we find ourselves unable to concur in the view expressed by the Springfield Court in the opinion above referred to.

The suit is one to recover damages for personal injuries received by the plaintiff and alleged to have been caused by the negligent sudden starting of defendant's street car while plaintiff was in the act of alighting, thereby precipitating her to the ground. The amount prayed as damages was $35,000. The plaintiff had verdict and judgment for $5000, and the defendant has appealed.

The record in this case is voluminous and bears most largely upon plaintiff's physical condition before and after her injury. It appears therefrom that in 1906 the plaintiff, Margarette W. Torreyson, was a school teacher, unmarried, forty-three years old, living at Martinsburg, Missouri, where she had resided for thirty-five years. During the last nineteen years she had taught the primary class of the school at Martinsburg, and when injured had been just re-employed for another year. The testimony is abundant to the effect that she was healthy, capable, energetic, active and industrious; not only a good school teacher but a leader in school and public entertainments. She was quick and graceful in her movements. As one of the witnesses put it, "she always went around like a cricket." In all her life down to the time of her injury she appears to have been in perfect general health, missing only about a week from her school duties in all her school teaching career, some twenty-seven years. She had lived with her parents, and toward the latter end of their lives, had the responsibility of the home, her mother being very old. Both of her parents died, the father about five years before she was injured. After his death she still kept



Digitized by Google

house in the old home, doing all the housework, with the assistance of a negro child.

On July 29, 1906, while visiting in the city of St. Louis, she became a passenger on one of the defendant's Euclid avenue cars and when the car was stopped at her destination, the southwest corner of Euclid avenue and West Pine boulevard, and when, according to her testimony, she was down on the step in the act of alighting therefrom, the operatives in charge caused it to be suddenly started with a jerk, precipitating her to the ground, striking the back of her head on the paving, and cutting a gash in it which bled profusely. The blow dazed her and caused a stunned sensation throughout her body. She was carried to a nearby hotel, and a physician, Dr. Butler, was called. The next day she was removed to a hospital where she remained under the constant care of Dr. Butler and the nurses for nine weeks. Dr. Butler called in for consultation Dr. Fry, an eminent specialist on nervous diseases, who visited and examined her frequently. She testified that while at the hospital she was perfectly helpless, having to be turned in the bed, to have her face washed, etc., suffered intense and almost continuous pain in the back, hip, small of the spine and base of the skull, had no appetite and could not sleep. At the end of the nine weeks, her brother took her from the hospital to his home at Laddonia, Missouri. Her condition was somewhat improved, but she was, and is still, very helpless. From the time she arrived at her brother's house until the day of the trial, she had not left the house but once, and that was for two hours in a roller chair, and that experience proved very exhausting and painful to her. Though weighing only 112 pounds when injured, she lost twenty pounds thereafter. A voluminous record abounds with testimony of those who saw and observed her, to the effect that her former health, ability and energy have been destroyed, her

Digitized by Google

former activities and industry ceased, and she has become a trembling, jerking, twitching nervous wreck, without power to earn a livelihood or to perform ordinary household duties, and usually confined to an invalid chair, able to arise therefrom and walk but for short intervals and then only haltingly, by the aid of a crutch and at the price of intense pain and suffering.

Four physicians, including Doctors Fry and Butler, testified on behalf of the plaintiff. Their testimony tended to prove that she is suffering from a pronounced neurasthenic condition, that is an extreme exhaustion or breaking down of her nervous system, and is unable to perform ordinary labor or to pursue her vocation; that this condition is permanent and was caused by her fall. On the other hand, a physician who examined her at the instance of the defendant testified that he found absolutely no indication that she had sustained any injury to the nervous system as a result of her injury. Another, a specialist in mental and nervous diseases, appointed by the court, testified that though she was quite nervous, he found nothing to indicate that the nervousness was in any wise due to any diseased condition of her nervous system. A surgeon, also appointed by the court, testified there was nothing abnormal in her condition from a surgical standpoint, and that he thought her tremors were voluntary, but he stated on cross-examination that he found physical indications of an abnormal condition, an irritation of the nerves. He also testified that the examination which he and the other physicians appointed by the court had made was too abbreviated and unsatisfactory to justify a decided opinion.

The plaintiff read in evidence the deposition of Captain N. Dix bearing on the length of time plaintiff taught school, the continuity of her service, the state of her health and strength and the extent and character of her activities during all the years up to

Digitized by Google

the time of her injury. During such reading the following occurred: (By counsel for plaintiff, reading.) "Q. What, if anything, do you know about her giving attention to her father and aunt during their last sickness? Mr. Jourdon: Objected to as immaterial. Objection overruled. To which ruling of the court defendant then and there duly excepted. A. That was her main—she kept house for him. She was the main dependence."

Later, while plaintiff was reading in evidence the deposition of one Rogers, the following occurred: (By counsel for plaintiff, reading.) "Q. What you do know of her taking care of her father and mother and aunt? Mr. Jourdan: I renew my objection to that for the reasons heretofore given. Objection overruled. To which ruling of the court defendant then and there duly excepted. A. Well, I think she was a faithful daughter. She stayed with them and kept house for them all. I don't know that she supported them. Q. What labor? A. Oh, well, she kept house." Dr. Taylor, one of the expert witnesses introduced by plaintiff, was permitted to testify as follows: "Q. Now, Doctor, I wish you would tell the jury in your own way what in your judgment is the trouble with Miss Torreyson and what is the probable cause of it? Mr. Jourdan: I object to that as calling for conclusion. That is the province of the jury. The Court: I think the Doctor is entitled to give an opinion as to what the plaintiff suffered from and what is the probable cause of it and the probable duration. Objection is overruled. To which ruling of the court defendant then and there duly excepted. A. Well, in forming our opinion, of course, we have got to take the history of the case into consideration. From the history of the case, I would call it a traumatic neuritis." Dr. Butler, another of her witnesses, testified as follows: "Q. Now, you may state, doctor in general terms what disease or affliction in your judg-

Digitized by Google

ment Miss Torreyson is now suffering from? A. Why, she is suffering from a nervous condition due to an injury—bodily injury, which is usually classed as traumatic neurosis. Mr. Jourdan: I move that the answer be stricken out. That is the province of the jury. The doctor has no right to state a conclusion. Motion overruled. To which ruling of the court defendant then and there duly excepted."

In his opening argument to the jury plaintiff's counsel made the following statement: "Mr. Crigler: We brought suit in this case, gentlemen of the jury, and ask in our petition, and ask it now at your hands, a verdict of $35,000. We brought this suit and ask this damage just the same as if the United Railways Company had executed its note to us, or if you had executed your note to me, without shaving the price of it in the least. And in this day of great corporations, and great millionaires, and great things, twenty-five or thirty thousand dollars— Mr. Jourdan: I except to that remark. The Court: There is no evidence of that here. Keep within the record, Mr. Crigler. Mr. Crigler: Well, I can't see why that is not a proper remark. The Court: Well, this defendant is a corporation, and you are appealing to a condition that is not in evidence. The only way to present the case is to present it within the record and draw such deductions as you see proper from it. Mr. Crigler: I am satisfied if the court had heard my statement it would not consider it improper. The Court: Well, you refer to great corporations and great millionaires. I don't know what millionaires have to do with the case. It is highly improper, and the purpose of it is perfectly apparent. You may proceed. Mr. Crigler: Well, in this great financial day the admeasurement of a certain sum of money is not like it was when you and I were boys— Mr. Jourdan: I except to that statement. There is no evidence of that in this case. The Court: Well, go

Digitized by Google

ahead. Mr. Jourdan: I submit that the court should rebuke counsel for making that remark." Plaintiff's counsel made the following statement to the jury in his closing argument. "Mr. Cullen: I have no criticism to make of that conductor. He has the instinct of human nature in him. You never saw a man whose careless conduct laid a human being low, either by cutting off a leg, or an arm, and leaving them prostrate in the street, that could look upon that bleeding body and say: 'Yes, it was my wrong; I did it.' When a man realizes that it is his misconduct, that he is at fault and blameable for the woes and sorrows of another, he says "Avaunt! Avaunt! quit my sight; I am not responsible for it; she did it herself.' He would be more than human if he had the power to come right up and say, 'Yes, it is my act that injured this girl.' Why, sir, he couldn't look into the pale and quivering face of that girl and be human and say: 'Yes, I did it.' No, he had nothing to say. 'I didn't do it.' 'I won't excuse myself.' You know, gentlemen, that there even might be a criminal responsibility for negligence that will make a man shield himself." Mr. Jourdan: "I except to that. The Court: Note the exception. Mr. Jourdan: I except to the failure of the court to rebuke counsel. Mr. Cullen: She (plaintiff) lived up there in that community so that she commanded the respect and admiration of everybody, and she sought employment not only there but elsewhere. She would go out into the world and work eight or nine months and make something for herself, and then when the time for vacation came on she would get some enjoyment out of this world. Where is she now? She is absolutely fatherless, motherless, helpless, penniless, a cripple to go down to the grave. Mr. Jourdan: I except to that statement. The Court: The reporter will note the exception. Mr. Jourdan: I except further to the

Digitized by Google

court's failure to rebuke counsel. The Court: Very well."

CAULFIELD, J. (after stating the facts).—I. The court committed no error in permitting one physician to testify that in his opinion plaintiff suffered from what he would call "a traumatic neuritis" and in permitting another physician to state that in his opinion "she is suffering from a nervous condition due to an injury—bodily injury, which is usually classed as traumatic neurosis." These were nothing more than statements as to the nature and character of plaintiff's ailment, without suggesting the particular cause, and therefore were competent. See Jerome v. United Railways Co., 155 Mo. App. 202, 134 S. W. 107, for a full and pertinent discussion as to the competency of such testimony.

II. Likewise the court committed no error in overruling the objections on the ground of immateriality to the questions propounded to witnesses Dix and Rogers as to plaintiff taking care of her father, mother and aunt, and as to what she did for her father and aunt during their last sicknesses. These inquiries had some bearing on the question of what was the physical ability of the plaintiff before her injury and we think were good against a mere general objection.

III. As to the remarks of counsel, we are of the opinion that whatever prejudice might have resulted from the language first complained of, it was sufficiently met and cured by the admonition of the trial court. As to the next remark we find that defendant's counsel stated "I except to that statement. There is no evidence of that in this case," meaning that he *objected* to the statement. But it does not appear that defendant's counsel saved any *exception* to the *ruling* of the court thereon. He merely remarked "I submit

Digitized by Google

that the court should rebuke counsel for making that remark." In the next two instances we find counsel for the defendant at the end of what appears to be a series of statements saying, "I except to that," and "I except to that statement," without attempting to point out what particular statement he objected to and without in any wise indicating on what ground he based his objection. By failing to preserve an exception to the action of the trial court in overruling an objection to remarks of counsel or in failing to administer a reprimand, a party will be regarded as having waived his objection in that behalf (State v. Thurman, 121 Mo. App. 374, 98 S. W. 819; Eppstein v. Mo. Pac. Ry. Co., 197 Mo. 720, 94 S. W. 967); and an objection is insufficient which does not point out the specific statement complained of and does not call the attention of the trial court to the specific grounds upon which it is based. [State v. Phillips, 233 Mo. 299, 135 S. W. 4; State v. Ruck, 194 Mo. 416, 92 S. W. 706.] We are, therefore, not inclined to consider the assignment of error which is aimed at the alleged improper remarks.

IV. At the instance of the plaintiff the court gave to the jury an instruction on the measure of damages as follows:

"If you find for the plaintiff in estimating and determining the amount of her damages you should take into consideration in connection with all the facts and circumstances in evidence such reasonable sums, if any, as you believe she necessarily paid out, or became obligated for, because of medical treatment and hospital charges on account of her injuries; the bodily pain and suffering and mental anguish endured by her, resulting from the injuries received; the character and extent of her injuries and whether they are permanent in their nature; the extent, if any, which she has been prevented and disabled by reason of such

Digitized by Google

injuries from working and earning a livelihood; and if from the evidence you believe and find that her injuries are reasonably certain to cause her pain and anguish in the future and reasonably certain to impair or lessen her ability to work or labor in the future, you should take said facts into consideration also; and if you find for plaintiff you should find for her in such sum as in your judgment under all the evidence in the case will reasonably compensate her for the injuries received, but not to exceed the sum named in the petition, to-wit: thirty-five thousand dollars."

Defendant contends that this instruction was erroneous because it assumes that the plaintiff was injured and also assumes that she had endured bodily pain and suffering and mental anguish. Instructions substantially like this one were discussed and held good against a like criticism in Klutts v. The St. Louis, Iron Mt. & So. Ry. Co., 75 Mo. 642; McCarthy v. St. Louis Transit Co., 108 Mo. App. 317, 83 S. W. 298; Gayle v. Missouri Car & Fdy. Co., 177 Mo. 427, 453, 76 S. W. 987. These cases proceed on the theory that by giving such an instruction the court does not assume or declare that the plaintiff had been injured or suffered bodily pain, etc. Substantially like instructions were also approved without comment in Prewitt v. M., K. & T. Ry. Co., 134 Mo. 615, 36 S. W. 667; Cobb v. Railroad, 149 Mo. 135, 50 S. W. 310. Under those authorities we conclude that the giving of this instruction was not reversible error. That conclusion may also be upheld on another ground which finds support in the authorities. It is certain at least that the fact of the plaintiff being bruised and injured and the extent of her injuries were not assumed, for this instruction is addressed to the jury only in the event that they find for the plaintiff, and other instructions given make such a finding conditional upon the jury finding that plaintiff had been

Digitized by Google

bruised and injured, and state that the burden of proving her injuries and the extent of such injuries was upon the plaintiff. The jury must have understood that the fact of plaintiff having been injured and the extent of her injuries was for them to find from the evidence. At the most, then, it might be said that by the instruction the court assumed that if the plaintiff was bruised and injured as the evidence tended to show she was then she must have endured some bodily pain and suffering and mental anguish. It was not error to indulge such an assumption, for pain and anguish must necessarily have followed such bruising and injury. [Dunn v. Electric Ry. Co., 81 Mo. App. 42.] But in York v. Everton, 121 Mo. App. 640, 645, 97 S. W. 604, and in Glover v. Railroad, 129 Mo. App. 563, 575, 108 S. W. 105, the Kansas City Court of Appeals has decided that the giving of such an instruction is reversible error, and we deem such decision contrary to our decision herein.

The judgment is affirmed, but on account of this decision being, as aforesaid, contrary to the above mentioned previous decisions of the Kansas City Court of Appeals, this cause will be certified and transferred to the Supreme Court in accordance with the requirement of the Constitution of our state. It is so ordered. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

Digitized by Google

# STATE OF MISSOURI, Defendant in Error, v MILTON MOSS, Plaintiff in Error.

**St. Louis Court of Appeals, March 5, 1912.**

1. **CRIMES AND PUNISHMENTS: Record: Necessity of Showing Arraignment.** In a criminal prosecution originating in a justice's court and taken to the circuit court by appeal, if the record does not affirmatively show an arraignment or plea by defendant, either before the justice or in the circuit court, the judgment should be arrested.

2. **———: Arraignment: Time: Appeal from Justice's Court.** In a criminal prosecution originating in a justice's court and taken to the circuit court by appeal, if there was no arraignment or plea before the justice, either one of these steps must be taken in the circuit court before the jury is sworn and any evidence is heard, since there is no issue to try until that is done.

3. **———: Appellate Practice: Failure of Record to Show Arraignment.** The objection to the failure to arraign accused or enter a plea may be first raised in the appellate court.

4. **———: Arraignment: Appeal from Justice's Court: Amended Transcript.** Where, in a criminal prosecution, originating in a justice's court and taken to the circuit court by appeal, the record did not show an arraignment of or plea by defendant, either in the justice's or the circuit court, an amended transcript of the justice, showing that formal arraignment was waived and a plea of not guilty entered before the justice, filed by leave while defendant's motion to arrest the judgment for failure of the record to show arraignment was pending, was not sufficient to cure the defect in the record, and hence the trial court erred in overruling the motion in arrest.

   *Held*, by NORTONI, J., concurring, that the voluntary amended transcript, filed after verdict, was insufficient to cure the defect, but that an amended transcript of the justice, showing the record and all its entries, could have been filed in the circuit court, pursuant to a rule on the justice, under the statute, or to a writ of *certiorari*, and the deficiency in the original transcript thus supplied.

Error to Jefferson Circuit Court.—*Hon. Joseph J. Williams*, Judge.

REVERSED AND REMANDED.

*Clyde Williams* and *R. A. Frazier* for plaintiff in error.

Digitized by Google

(1) The court was without jurisdiction to try the cause, there being no transcript on file from the justice. State v. Metzger, 26 Mo. 65; State v. Cowden, 85 Mo. App. 403. (2) Neither the purported transcript of the justice nor the circuit court records show any arraignment or plea of defendant. State v. Llewellyn, 93 Mo. App. 469; State v. Sharpe, 119 Mo. App. 386. (3) The court committed error in permitting the pretended transcript from the justice to be filed. (a) Because it was filed after the trial and after the motion for a new trial and in arrest of judgment had been filed by defendant. (b) Because what purported to be the transcript from the justice and the one upon which defendant was tried was already on file. (c) Because it was not filed within three days after appeal taken as required by law. (d) Because after trial the court could not change the record upon which the defendant was tried. R. S. 1909, secs. 5004 and 5005.

*Albert Miller* for defendant in error.

STATEMENT.—Proceeding on writ of error. Defendant was convicted of a misdemeanor before a justice of the peace. He appealed to the circuit court where he was again convicted, and he comes here for a review of the case. The record does not disclose any arraignment or plea in the circuit court, nor does the original transcript of the justice show such arraignment or plea before the justice. But after verdict the defendant moved for a new trial and in arrest of judgment on the ground that the record does not show an arraignment or plea of the defendant, and while those motions were pending and undisposed of, the prosecuting attorney, by leave of court, filed an amended transcript of the justice purporting to show that formal arraignment was waived and a plea of not guilty entered before the justice. Thereupon

Digitized by Google

defendant's motions were overruled and judgment entered against him in accordance with the verdict.

CAULFIELD, J. (after stating the facts).—The motion in arrest of judgment should have been sustained because the record failed to show an arraignment or plea of the defendant either before the justice or in the circuit court. [State v. West, 84 Mo. 440.] It is true that after verdict, and while the motion was pending, this defect was attempted to be cured by the filing of a so-called amended transcript, but we are of the opinion that that filing came too late. The arraignment and plea of the accused are matters of substance and not of mere form. They must have occurred either before the justice or in the circuit court, and the record must affirmatively show the fact. [State v. Geiger, 45 Mo. App. 111.] If there was no arraignment or plea before the justice, then these must be the first steps in the progress of the trial in the circuit court. "They must precede the swearing of the jury and the hearing of the evidence *for till they occur there* is no issue to try." (The italics are our own.) [State v. Montgomery, 63 Mo. 296; State v. Saunders, 53 Mo. 234; State v. Mikel, 125 Mo. App. 287, 102 S. W. 19; State v. Sharpe, 119 Mo. App. 386, 95 S. W. 298.] A trial had without arraignment or plea is so much without effect that the defect may be noticed for the first time in the appellate court. [State v. Mikel, supra.] And so jealously is this matter of arraignment before trial guarded that though the statute provided that if a person arraigned deny the charge in any form, or require a trial, or refuse to plead or answer, and in all cases when he does not confess the indictment to be true, a plea of not guilty may be entered and the trial proceed, still it was held that a plea of not guilty could not be entered, *nunc pro tunc,* after verdict. [State v. Saunders, 53 Mo. 234, 236.] In that case the Su-

Digitized by Google

preme Court said: "In the present case the prisoner was tried throughout without any issue being framed on which a trial could be had. It is evident there was no issue either in form or substance. It was undoubtedly a mere inadvertence on the part of the prosecuting officer, but it is fatal to the proceedings. And as there was no issue made or entered of record, it was not permissible to supply one after verdict. Such a proceeding would be exceedingly dangerous, and we are not willing to sanction it." Now, in the case at bar, when this case was called for trial the justice's transcript did not disclose that the defendant had been arraigned before the justice. It is clear that as long as that transcript remained unamended the defendant had a right to rely upon it and to govern his conduct and participation in the case accordingly. According to the showing made by the transcript it was absolutely necessary that the defendant be arraigned and a plea entered for him in the circuit court before the jury was sworn or a legal trial could be had. The jury was sworn and the trial proceeded without any arraignment or plea. As the record stood, according to the decisions, no conviction could stand, and defendant was not bound to offer any testimony or make objection to any offered by the state. The proceeding appeared to be merely void. Now it is clear that if the state after verdict be permitted to have the justice's transcript changed to show an arraignment or plea before the justice the situation would be vitally altered. For the first time, after verdict, the record would be made to disclose that an issue had been made up and the defendant forced to his defense where before it appeared that there was no issue and no necessity of defending. Such a proceeding is exceedingly dangerous and we are of the opinion that it should not be permitted. In this view it is not necessary to determine the doubtful question whether the amended transcript could have been considered even if filed in

Digitized by Google

time and by leave, not having been brought up to the circuit court either by rule upon the justice or by *certiorari*. [Smith v. Chapman, 71 Mo. 217; Horton v. St. Louis, I. M. & S. Ry. Co., 21 Mo. App. 147; Thomas v. Moore, 46 Mo. App. 22; Ford v. Gray, 131 Mo. App. 240, 110 S. W. 692; Stephenson v. Adding Machine Co., 150 Mo. App. 555, 131 S. W. 162.] Upon a retrial the defendant may be arraigned and a plea entered for him in the circuit court and the record made to show the fact and this will render what occurred in the justice court in that respect immaterial. [State v. Geiger, supra.]

The judgment is reversed and the cause remanded. *Reynolds, P. J.*, and *Nortoni, J.*, concur, the latter in the result by separate opinion.

## CONCURRING OPINION.

NORTONI, J.—I concur in the result on the ground that a mere voluntary amended transcript filed after verdict is insufficient.

That the original transcript of the justice docket is insufficient and inaccurate is conceded. Such being true, an amended transcript, showing the record and all of its entries, could be filed in the circuit court, and the deficiency in the original thus supplied, by following an orderly course of procedure. As the arraignment was not shown in the original transcript filed under the statute with the appeal, it could only be shown in the circuit court by an amended transcript filed in obedience to a rule on the justice under the authority of the statute in such cases made and provided or by the full and complete record brought up on *certiorari*. In my opinion, the mere voluntary filing, by the prosecuting attorney, of an alleged amended transcript without regard to the orderly course as to such matters is of no avail. [See Smith v. Chapman, 71 Mo. 217.]

Digitized by Google

# GENERAL RENTING & INVESTMENT COMPANY, Respondent, v. JOHN BERNARDNON, Appellant.

**St. Louis Court of Appeals, March 5, 1912.**

1. **APPELLATE PRACTICE: Conclusiveness of Findings of Fact.** The finding of the trial court on conflicting evidence is conclusive on appeal.
2. **ACCORD AND SATISFACTION: Burden of Proof: Receipt Construed.** Where a cement walk was not laid in accordance with the specifications, a receipt for a less amount than the contract price, reciting that the contractor guaranteed the work for two years, does not on its face completely displace the contractor's prior obligation to perform the work in accordance with the specifications, or reveal a settlement on account of the breach of that obligation, so as to shift the burden on the owner to show, in an action for damages for the breach, that such damages were not included in the settlement, and hence the burden to prove they were so included rested on defendant.
3. ———: **Nature: Burden of Proof.** The plea of accord and satisfaction is one of confession and avoidance, and ordinarily the one pleading it has the burden of proof to sustain it.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench,* Judge.

AFFIRMED.

*Seneca C. Taylor* and *H. A. & C. R. Hamilton* for appellant.

(1) Accord and satisfaction discharges a liability and the agreement between the parties in satisfaction of such liability defines and limits their obligation. 1 Am. and Eng. Ency. Law, p. 423; Marshall v. Larkin, 82 Mo. App. 635; Worden v. Houston, 92 Mo. App. 371; Babcock v. Hawkins, 23 Vt. 561. (2) The receipt of December 21, 1904, was executed after plaintiff claimed it noticed defects in the work and after a dis-

Digitized by Google

pute between the parties; unless it clearly appears that the parties agreed to leave the matter open, the receipt is conclusive upon them. Corder v. Martin, 17 Mo. 36; Reisenleiter v. Lutherische Kirche, 29 Mo. App. 291.

*Arthur Digby* for respondent.

(1) The appellant must be consistent, and if he asks the court below to proceed in a certain manner, he cannot complain in an appellate court that the action is erroneous. Stevens v. Crane, 116 Mo. 408; Harper v. Morse, 114 Mo. 317. (2) Where a jury is waived and the issues of fact are submitted to the court, all presumptions are in favor of the correctness of the finding of the court upon the questions of fact involved. Bond & Stock Co. v. Louis Houck, 213 Mo. 416; Jordan v. Davis, 172 Mo. 599; Hamilton v. Boggess, 63 Mo. 251. (3) In law cases the appellate court does not, as a rule, review the evidence further than to ascertain if there was any substantial evidence to support the verdict. Brewing Co. v. St. Louis, 209 Mo. 600; Furniture Co. v. Toll, 133 Mo. App. 404. (4) A party will not be heard to complain of instructions similar to those asked by him. Whitmore v. Supreme Lodge, 100 Mo. 36; Tube Works Co. v. Machine Co., 201 Mo. 30.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of a breach of contract for laying concrete sidewalks. A jury was waived and the issue tried before the court. Plaintiff recovered and defendant prosecutes the appeal.

It appears that plaintiff, a corporation, erected a number of residences on Vernon avenue in the city of St. Louis and let the contract to defendant for the construction of concrete walks, steps, foundations,



Digitized by Google

etc. The work was to be done according to certain plans and specifications furnished by plaintiff, and it amounted in all to more than $1000 in value. The evidence tends to prove that defendant breached the contract, in that he omitted to construct the sidewalks according to the plans and specifications. It is said that defendant not only employed an insufficient amount of cement in the walks, but constructed them defectively throughout, and the court so found the fact to be. Subsequently, the walks cracked, crumbled and became worthless. By his answer, defendant pleaded an accord and satisfaction, to the effect that in December, after the walks were completed, he made a full and complete settlement with plaintiff, taking into account all of the items of damage for which the suit is prosecuted; that at this settlement defendant was required to forego a portion of the amount due him and accept from plaintiff $200.13 in full of all claims, etc.

It is argued, first, that the evidence conclusively shows an accord and satisfaction was had between the parties as pleaded in the answer and that plaintiff, after requiring defendant to forego a portion of his account, accepted from him a guaranty of the work for two years in lieu of all other claims. A recovery was allowed for defective construction of the walks and for failure of defendant to comply with the plans and specifications without regard to his guaranty for two years. Because of this, it is argued the judgment should be reversed. The evidence is by no means conclusive touching the matter of accord and satisfaction as urged by defendant. While it appears plaintiff knew the walks were not constructed as they should be at the time the final payment was made, the evidence is that the dispute between the parties at that time concerned the measurements. By the contract plaintiff was to receive fourteen cents per square foot for laying the walks, and he claimed a balance of $217

Digitized by Google

therefor. Plaintiff disputed the measurement as to this, and both parties remeasured the work. After this remeasurement, they agreed that the amount due defendant therefor was $200.13. Plaintiff paid this amount to defendant and received a receipt therefor, which by its last clause contains the guaranty of the work for two years. According to the testimony of defendant, this settlement contemplated the defective condition of the walks, and he reduced his demand on account of that. But, as said, plaintiff insists to the contrary and says the matter in dispute concerned the measurements only. The receipt executed by defendant to plaintiff at the time the final payment was made is as follows:

"$200.13. St. Louis, Mo., 21 Dec., 1904.

Received from General Renting and I. Co., two hundred 13-100 dollars, in full for all granitoid and cement work done on Olive, Vernon Ave. and Cates Ave. jobs. I guarantee this work for two years.

"VENETIAN MOSAIC & GRANITOID CO.,
By JOHN BERNARDON, Prs."

Touching this matter, both parties, by their instructions, formed an issue of fact for the court. On this issue the court found for plaintiff to the effect that no accord and satisfaction as to the defective condition of the walks was had. There is substantial evidence in the record which tends to support the finding of the court that defendant did not forego any portion of the amount claimed by him for the purpose of compensating plaintiff on account of the defective condition of the walks and that plaintiff did not accept the guaranty for two years in lieu of defendant's obligation to perform his contract for building the walks in accordance with the plans and specifications. This being true, the judgment to the effect that no accord and satisfaction was had between the parties is con-

Digitized by Google

clusive on appeal, for we may not weigh the evidence here. [Donaldson Bond, etc., Co. v. Houck, 213 Mo. 416, 112 S. W. 242.]

By an instruction given for plaintiff, the court placed the burden of proof touching the accord and satisfaction on defendant, and it is argued this was error, for it is said that upon its appearing a settlement was made in December the burden of proof shifted to plaintiff to show that the claim for damages was not included in that settlement. There is nothing whatever in the writing above copied containing the receipt and guaranty suggesting that a settlement was had on account of the defective construction of the walks, and plaintiff's evidence disputes the proposition throughout. The words, "I guarantee this work for two years" in no sense imply that plaintiff released defendant from his obligation to construct the walks in the first instance in accordance with the plans and specifications stipulated in the original contract. Nothing whatever appears to this effect in the writing. In other words, this language, forming the subsequent guaranty of the work, does not completely displace and supersede the prior obligation to perform it according to the plans and specifications and reveal a settlement on account of the breach of that obligation so as to shift the burden on plaintiff to show the defective construction was not included in the settlement. The plea of accord and satisfaction is one in confession and avoidance and ordinarily when a defendant pleads it the burden of proof is with him to sustain it. [2 Greenleaf on Evidence (16 Ed.), sec. 32.] We discern nothing in the record before us which relieves the matter from the influence of the general rule. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

Digitized by Google

# SIMON KARP, Appellant, v. JEFFERSON B. BARTON, Respondent.

**St. Louis Court of Appeals, March 5, 1912.**

1. **LANDLORD AND TENANT: Injury Suffered on Demised Property: Liability of Landlord.** Where portions of a building are let to several tenants, with part in common for the use of all, the landlord is bound to exercise ordinary care to keep such part in a reasonably safe condition, and for the breach of such duty, causing the death of a child of a person boarding and lodging with one of the tenants, the landlord is liable.

2. ———: ———: ———: **Notice of Defects: Sufficiency of Evidence.** In an action against a landlord for the death of the child of a person who boarded and lodged with one of the tenants, caused by a defect in a porch used by all the tenants, evidence that the landlord's agent who had charge of repairs had been notified of the defect and that the defect had existed for two months before the accident, warranted a finding that the landlord had constructive notice of it.

3. ———: ———: ———: **Liability to Tenant's Visitors and Lodgers.** The obligation of a landlord extends the same to those visiting or calling upon members of the tenant's family, as it does to the tenant himself; and so a child of one who boarded and lodged with a tenant had a right to be upon a porch of an upper story of the building, which was used in common by all the tenants, and the parent could recover from the landlord for the death of the child owing to a defect in the porch which the landlord had negligently failed to repair.

4. **NEGLIGENCE: Contributory Negligence: Four-Year-Old Child.** A four-year-old child, who swung his body through a third-story porch banister, while holding to the rail, and thus met his death by falling to the ground, was not guilty of contributory negligence as a matter of law.

5. ———: ———: **Negligence of Parent.** In an action under the Damage Act by the father of a four-year-old child, who swung his body through a third-story porch banister, while holding to the rail, and thus met his death by falling to the ground, *held*, there was nothing in the case suggesting such contributory negligence on the part of the father as would preclude his right of recovery as a matter of law.

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett*, Judge.

Digitized by Google

REVERSED AND REMANDED.

*Robertson & Robertson, Hattie Greensfelder* and *Arnold Loewenstein* for appellant.

(1) The owner of a building who divides it into several apartments which he lets to various tenants, retaining to himself control of the halls and stairways for the common use of the different tenants and those having lawful occasion to be there, is bound to see that reasonable care and skill are exercised to render the halls and stairways, porches and landings, reasonably fit for the uses which he thus invites his tenants and others to make of them, and is responsible for any injury which his tenants and others lawfully using them, with due care, sustain through his failure to discharge his duty. Responsibility follows control. Lang v. Adv. Sheets, 138 S. W. 698; Marcheck v. Klute, 133 Mo. App. 280; McGinley v. Trust Co., 168 Mo. 257; Herdt v. Koenig, 119 S. W. 56; Leydecker v. Brintall, 158 Mass. 296; Watkins v. Goodall, 138 Mass. 533; Griffin v. Light Co., 92 Am. St. Rep. 520; Burke v. Hulett, 216 Ill. 545; Gleason v. Boehm, 58 N. J. L. 475; Ross v. Jackson, 51 S. E. 578; Smith v. Walsh, 92 Md. 518; Peil v. Reinhart, 127 N. Y. 381; Payne v. Irwin, 144 Ill. 482; Gallagher v. Britton, 73 Conn. 172; Peters v. Kelly, 113 N. Y. S. 357; Shearman & Redfield on Negligence, sec. 710. (2) In the case at bar respondent himself and his agents had actual notice of the defective condition of the porch railing. However, even though he had no actual notice of such a condition of his premises, the law imposes upon him, the owner of such tenement property, that he exercise such care and prudence to discover such defects that should have been seen and corrected. And if such defects have continued a sufficient length of time, as in this instance, for at least five months, then the respondent will be charged with notice thereof. Herdt

Digitized by Google

v. Koenig, 119 S. W. 56; Udden v. O'Reilly, 180 Mo. 650; Wiggen v. St. Louis, 135 Mo. 558; Shoninger v. Mann, 219 Ill. 242; Ross v. Jackson, 51 S. E. 578; Burke v. Hullett, 216 Ill. 545; Wilcox v. Hines, 100 Tenn. 524; Schwartz v. Monday, 97 N. Y. S. 978; Dollard v. Roberts, 130 N. Y. 267; Lindsay v. Leighton, 150 Mass. 285; Leydecker v. Brintall, 158 Mass. 292; Waterhouse v. Brew Co., 94 N. W. 587; Patterson v. Brewing Co., 91 N. W. 336. (3) A landlord who rents his premises for residence purposes and receives compensation for their use is in duty bound to contemplate all ordinary and reasonable purposes for which same might be used, and that friends of tenants' families might visit them without express invitation, so the obligation of the landlord to exercise reasonable care to keep the common or retained portions of the property in repair extends on the doctrine of implied invitation to such friends who call without express invitation. McGinley v. Trust Co., 168 Mo. 257; Herdt v. Koenig, 119 S. W. 56; Widing v. Ins. Co., 104 N. W. 239; Curtis v. Kiley, 153 Mass. 123; Stern v. Miller, 111 N. Y. S. 659. (4) It is a reasonable characteristic of children to so use porches of a tenement house to play on, which fact has a tendency to establish an implied invitation to use same. Miller v. Peck, 104 Mo. App. 609; Lewright v. Ahrens, 60 Mo. App. 118; Schmidt v. Dist. Co., 90 Mo. 284; Farley v. Byers, 111 N. W. 1023; Widing v. Ins. Co., supra; Car Co. v. Cooper, 46 Am. St. Rep. 216, 40 Ark. 545. Therefore, where one maintains premises, which from their peculiar nature are within the sphere of the "attractive" influence of children, and when this is known or could have been known by the owner, he ought to reasonably anticipate children would use them; respondent should have so anticipated the use of his property. And plaintiff's child was invited on the premises. Berry v. Railroad, 214 Mo. 593; Childress v. Railroad, 126 S. W. 169; Hillerbrand v. Merc. Co., 121 S. W.

Digitized by Google

326; Porter v. Anheuser-Busch, 24 Mo. App. 1; Light & Power Co. v. Healy, 13 Am. Neg. Rep. 71; Car Co. v. Cooper, 46 Am. St. Rep. 216, 60 Ark. 545; Barnes v. Railroad, 49 Am. St. Rep. 417; Franks v. Oil Co., 65 S. E. 339; 1 Thompson on Neg., sec. 1024; Shearman & Redfield on Neg., sec. 705; Barnes v. Railroad, 49 Am. St. Rep. 417; Pekin v. McMahen, 154 Ill. 141; St. & L. Co. v. Webb's Adm., 11 S. W. 512. (5) In determining whether appellant was guilty of contributory negligence in permitting his deceased child to escape from his custody and go upon the defective premises, it should be taken into consideration whether appellant exercised that degree of care and watchfulness that is reasonable for a parent in like circumstances and under surrounding conditions. Cornovski v. Tran. Co., 207 Mo. 263; Levin v. Railroad, 140 Mo. 624; Czezewzka v. Railroad, 121 Mo. 201; McNown v. Railroad, 55 Mo. App. 585; Winters v. Railroad, 99 Mo. 509; Railroad v. Raymond, 148 Ill. 241; Feldman v. Railroad, 127 N. W. 687; Tecker v. Railroad, 111 Pac. 791; Long v. Railroad, 107 S. W. 203; Murray v. Railroad, 36 Pac. Sup. Ct. 576; Parotta v. Railroad, 40 Pa. Sup. Ct. 138.

*Jos. Barton* and *Barclay, Fauntleroy & Cullen* for respondent.

(1) All three counts of the petition are defective because proceeding on the theory of attractiveness to children and failing to allege *scienter* on defendant's part. Berry v. Railroad, 214 Mo. 607. (2) Even if, for the sake of argument, we grant that the absence of the uprights was negligence and that this absence caused Milton Karp's death, plaintiff cannot recover because he does not prove that deceased fell through the uprights which defendant had allowed to be taken away. The burden of plaintiff is to show that the accident was due to defendant's negligence, and,

Digitized by Google

if from aught that appears, it may have been due to other causes, a verdict should be directed for the defendant. Fuchs v. St. Louis, 167 Mo. 620. (3) The deceased was a trespasser and therefore there is no right of recovery upon any possible combination of facts. The general rule undoubtedly is, that the owner or occupier of land is not bound to take pains to prepare his premises in any particular way, to the end of promoting the safety of children who may come thereon as trespassers or as bare licensees; but that, as in the case of adults, they take the premises as they find them, and if they are killed or injured by reason of the condition in which they find them, this does not give a right to an action for damages. Moran v. Car Co., 134 Mo. 641; Witte v. Stifel, 126 Mo. 295; Schmidt v. Distilling Co., 90 Mo. 284; 1 Thompson Neg. (2 Ed.), sec. 1025. (4) A landlord is not liable for defects existing at the time of letting, and is under no obligation to keep premises in repair. Graff v. Lemp Co., 130 Mo. App. 602; Roberts v. Cottey, 100 Mo. App. 503. In the absence of a contract to repair, there is no obligation to do so. Glen v. Hill, 210 Mo. 296; Vai v. Wells, 17 Mo. 232; Ward v. Fagin, 101 Mo. 673; Zeitig v. Chemical Co., 131 S. W. 132; Coats v. Meriweather, 144 Mo. App. 89; Andrus v. Co., 117 Mo. App. 322. And the obligation to repair is on the tenant from month to month. Deutsch v. Abeles, 15 Mo. App. 398. (5) Plaintiff was guilty of contributory negligence, barring recovery, in allowing a child of such tender years to play on a porch he knew was dangerous. A parent negligence is a bar to a recovery for the child's death, though same would not be imputable to child suing in his own right for an injury. Berry v. Railroad, 214 Mo. 603.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of the wrongful death of his minor son. At the conclusion of the evidence the court

Digitized by Google

instructed a verdict for defendant and plaintiff prosecutes the appeal.

It appears defendant owns a three-story brick tenement building numbered 1010-1012 North Ninth street in the city of St. Louis. This building is subdivided into several separate apartments or flats which defendant lets to his tenants for residence purposes. Across the rear end of the building and at each story thereof defendant maintains a porch for the accommodation of the tenants. As we understand the evidence, the building runs east and west, and on each floor there is an apartment known as the south flat and one known as the north flat. The porch referred to extends north and south along the east end of the building and it is said to be common to both apartments or flats on that floor. The particular porch involved here is that on the level of the third floor of the building, and but one stairway leads from the porch below to it. The tenants from either the north or south flat of the third floor are required to pass over the same porch and down the same stairway to the porch below, from whence they pass by another stairway to the earth beneath. Neither the porch on the level with the second or third floor is partitioned off as though a portion only was intended for the use of those occupying either apartment, but instead the construction suggests the whole should be used in common by the tenants. Besides the construction of the porches themselves, the record is replete with evidence tending to prove that both the porches at the second and the third floor were common to all of the tenants on those floors. According to the plan of construction, both the porches at the second and third floors are protected by railings or banisters, about three feet in height, which pass from north to south for the full length of the porch which serves the two apartments. These banisters are constructed of pickets which were nailed between the sill and top-

Digitized by Google

most rail of the banister. The evidence is, that for as much as two months before the day on which plaintiff's child came to his death, a number of these pickets had been dislodged from their place in the banister so that a considerable space for as much as two or three feet wide was open and unprotected.

Plaintiff's wife had died but a few days before, and he, together with his three little children, had taken quarters and board with Mrs. Harr, a tenant of the building, 1010-1012, on the first floor thereof, where he was confined to his room through the observance of mourning rites enjoined by the Jewish faith, to which he is a devotee. On the day in question, his infant son, Milton Karp, aged about four years, went out to play with the children of other tenants and in a short time thereafter came to his death by falling from the porch on the level of the third floor of the same building. The little fellow had gone up stairs in company with Abbie Washour, whose mother lived there, to play. Two other children, plaintiff's child and Abbie Washour were playing on the porch together near where the railing or banister was defective by reason of the absence of the several pickets above mentioned. Plaintiff's son clasped the topmost rail with his hands and was in the act of swinging the weight of his little body through the banister where defendant had suffered the pickets to be negligently removed, when his hold on the banister slipped and he fell to the earth below. From the injuries so received, the child died the following day.

At the conclusion of the evidence for plaintiff, the court directed a verdict for defendant, but upon what theory we are unable to perceive. There can be no doubt that plaintiff made a prima facie case for the jury. Though it be true that ordinarily the landlord is not liable to one suffering injury through his negligent failure to repair the premises after letting, the principle is wholly without influence here, for it never

Digitized by Google

obtains with respect to common property. The evidence is abundant to the effect that the porch adjacent to the third floor of the building and from which the little child fell to his death is common property used by all of the tenants alike in connection with the tenement they enjoy and over which defendant landlord necessarily reserved, in a measure, the right of control. In such circumstances, where different portions of the same building are let to different tenants with a portion in common for the use of all, there is an implied obligation imposed by the law upon the landlord to exercise ordinary care to keep such common portion of the premises in a reasonably safe condition for such purposes as may reasonably be anticipated to be a proper use of the property for which it is let. As to such common portions of tenement property, the rule proceeds upon the theory that the landlord, not having let it to any one of the tenants, has, of course, reserved control thereof to himself. When an injury results to a third person rightfully upon the premises through the negligence of the landlord with respect to maintaining any portion of such common property, responsibility therefor is entailed against him as a correlative to the obligation and duty to repair. [McGinley v. Alliance Trust Co., 168 Mo. 257, 66 S. W. 153; Herdt v. Koenig, 137 Mo. App. 589, 119 S. W. 56.] Besides it appearing that defendant's agent who had charge of repairs had long since been notified of the defective condition of the porch, it is in evidence, too, that the porch railing had been thus defective for as much as two months theretofore. On this evidence, the jury could, of course, find that defendant had constructive knowledge of the defective condition of the banister and notwithstanding had negligently failed to observe his obligation to repair it, to the end that it might be reasonably safe. That plaintiff's son was rightfully upon the premises no one can doubt, for he with two other children had gone

Digitized by Google

upon the third story porch to play with Abbie Washour whose mother was the tenant in the apartment adjacent and appurtenant in part to which was the defective porch. As it is within the reasonable intent of a demise of residence property the tenant may enjoy the social calls of the family friends, no one can doubt that the obligation of the landlord extends the same to those socially visiting or calling upon members of the tenant's family, as it does to the tenant himself. [Herdt v. Koenig, 137 Mo. App. 589, 596, 119 S. W. 56; Henkel v. Murr, 38 Hun (N. Y.) 28.]

The mere fact that plaintiff's little son swung his body through the third story banister while holding to the rail and thereby came to his death is not sufficient to preclude a right of recovery as a matter of law on the score of contributory negligence on the part of the child. Obviously the question requires no discussion. [See Holmes v. Mo. Pac. R. Co., 190 Mo. 98, 88 S. W. 623.] We see nothing in the cause suggesting such contributory negligence on the part of the plaintiff father as would preclude his right of recovery as a matter of law. In all its aspects, the case is one for the jury. The judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

Digitized by Google

# MRS. GEORGE ROSS, Respondent, v. MAY, STERN & COMPANY, Appellant.

**St. Louis Court of Appeals, March 5, 1912.**

1. **REPLEVIN: Right of Possession: Burden of Proof.** To maintain replevin, plaintiff must show a general or special property in himself with respect to the goods sued for.

2. **RES ADJUDICATA: Judgments: Replevin: Defective Verdict.** Where, in replevin to recover goods, which were delivered to the plaintiff under the writ, the burden was on the plaintiff to show general or special property in himself with respect to the goods, and a general verdict was rendered for the defendant, which was defective as a verdict in replevin for failure to find whether the defendant had the right of property or the right of possession only at the commencement of the suit, and, if either, then to find the value of the property and damages for withholding the same, as required by sections 7779, 7780, Revised Statutes 1909, but judgment was rendered on the verdict as rendered, and no appeal was taken therefrom, such judgment constituted a conclusive adjudication between the parties as to the defendant's right of property in the goods, and was, therefore, conclusive of that question in a subsequent action by the defendant in the replevin suit against the plaintiff in that suit, for conversion of the goods.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields,* Judge.

AFFIRMED.

*H. A. Loevy* for appellants.

(1) Instruction of nonsuit has been given because: (a) By the judgment in the replevin suit all questions litigated or that could have been litigated in that case became *res judicata,* and the trial court had no power in this case to build up or work out a different judgment from that rendered therein. (b) The goods sued for were delivered to appellants by the constable under a valid writ in a valid replevin suit against respondent. The judgment in the replevin

Digitized by Google

suit did not command or require a return of the property nor assess its value, therefore, appellants could not be and were not in the position of unlawfully withholding it from respondent or converting it, and were therefore entitled to retain it under that judgment, or under the terms of the chattel mortgage on the property, condition thereof having been broken by respondent by long-continued default in payment of purchase price. (c) The *probata* do not sustain or correspond with the *allegata*. The latter shows a claim of general ownership, the former shows an alleged title under a judgment, which does not confer any. (2) Instructions for respondent (plaintiff) are erroneous: Instruction 1 is wrong because the judgment in the replevin case does not furnish the construction given it by the trial court in this case. (3) The court erred (a) in excluding respondent's note and the chattel mortgage to appellants securing it, and (b) in refusing instruction based thereon offered by appellant for reasons set forth in point 1. Authorities in support of these three points: 23 Cyc. 866; 8 Words and Phrases, 7294, 1st col.; Sewell v. Glidden, 1 Ala. 52; Wells Replevin, sec. 741, p. 623, and sec. 749; 22 Ency. Pl. and Pr. 875; Britton v. Birdell, 228 Mo. 633; Caldwell v. Ryan, 210 Mo. 22; Hanlon v. O'Keefe, 55 Mo. App. 532; White v. Van Houten, 51 Mo. 579; Morrison v. Yancey, 23 Mo. App. 672; Cates v. Nickell, 42 Mo. 70; Dawson case, 111 Mo. App. 538; Benne v. Miller, 149 Mo. 228; Johnson v. Grayson, 130 S. W. 690; Hennelly v. Arbuckle, 13 Mo. 209; State v. Clifford, 128 S. W. 859.

*R. G. Meigs* and *Jno. B. Dempsey* for respondent.

(1) This judgment rendered by the justice and entered in his docket was the proper one on such a verdict. R. S. 1909, sec. 7517; Stroud v. Morton, 70 Mo. App. 647. (2) And while not in full accordance

Digitized by Google

with the provisions of the statute governing judgments in justice courts, yet the plaintiff (appellant here), having taken no appeal therefrom will be held to have waived the defect. Dixon v. Atkinson, 86 Mo. App. 24; Herring v. Corder, 49 Mo. App. 378; Cobbey on Replevin, secs. 1063-4; Hopper v. Hopper, 84 Mo. App. 117. (3) A verdict for plaintiff in replevin will not be set aside because the jury did not find damages. Cobbey on Replevin, sec. 1074. (4) A verdict for defendant in an action of replevin will not be set aside for failure of the jury to assess the value, where the property is in possession of plaintiff, and the court may render a judgment for the return of the property to defendant. Stroud v. Morton, 70 Mo. App. 647.

NORTONI, J.—This is an action in trover as for conversion. Plaintiff recovered and defendant prosecutes the appeal. The subject of the controversy is a small parcel of household goods valued at something over one hundred dollars, and the question for consideration relates to the fact that the court accepted and treated a prior defective verdict and judgment in replevin between the same parties touching the same subject-matter as conclusive with respect to plaintiff's right of property and possession thereafter.

The evidence tends to prove that plaintiff owned the household goods in controversy, and that she had possession thereof at the time the replevin suit was instituted against her is not questioned. Defendant claimed to be entitled to the possession of the goods under a chattel mortgage which it held thereon for a portion of the purchase price. Under this claim defendant instituted a replevin suit against plaintiff here, and the household goods involved were delivered to defendant by the constable under the writ in replevin. The replevin suit was instituted and tried be-

Digitized by Google

fore a justice of the peace. At the conclusion of the trial, the verdict and judgment therein were for the defendant in replevin, or the plaintiff in the present suit, in conversion. But though the verdict and judgment were for the defendant in the replevin suit before the justice, they were defective when measured by the requirement of the statutes in such cases. The statute (Secs. 7779, 7780, R. S. 1909) concerning the verdict and judgment in replevin before a justice of the peace when the property in dispute shall be delivered to the plaintiff therein and the verdict and judgment are for the defendant in replevin provide, substantially, as follows: Section 7779 provides that where the property has been delivered to the plaintiff and the finding is for the defendant, the justice or jury shall find whether the defendant had the right of property, or the right of possession only at the commencement of the suit, and if they find either in favor of the defendant they shall also find the value of the property or the value of the possession and such damages for withholding the property as may be just. Section 7780, relating to the judgment which should be entered on such a state of facts, provides that the judgment shall be against the plaintiff and the sureties for the return of the property, or that they pay the value so assessed in the discretion of the defendant, or the value of the possession of the same in case a return cannot be had or shall not be ordered and for the damages assessed and cost of suit. In the suit in replevin with which we are now concerned, neither the verdict nor judgment conform to the statutory requirements quoted. The jury returned a verdict in the replevin suit as follows: "We, the jury, find for the defendant." On this verdict the justice adjudged that plaintiff recover nothing from the defendant and that the plaintiff pay the costs of the action. No appeal was prosecuted from the judgment of the justice



Digitized by Google

in the replevin suit and notwithstanding the verdict for the defendant therein, plaintiff here, the plaintiff therein, defendant here, who had acquired possession of the property under the writ of replevin, continued to hold possession of the household goods and this, too, after demand therefor on the part of the present plaintiff in whose favor the verdict and judgment in replevin were given. As the defendant, who was the plaintiff in replevin, refused to surrender the household goods to plaintiff, who was defendant in replevin, she instituted this suit in conversion for the value thereof.

On the trial of the present suit, the plaintiff introduced evidence tending to prove that she owned the property and that it was in her possession at the time defendant instituted the replevin suit against her. It was shown, too, that defendant took the property out of her possession under the writ of replevin as above detailed and still held it notwithstanding the verdict and judgment therein in her favor. Plaintiff introduced the verdict and judgment in replevin in evidence over the objection of defendant, and the court by rulings on evidence and instructions to the jury accepted such verdict and judgment in the replevin suit, though defective in form, as conclusive to the effect that defendant was not entitled to withhold the property from plaintiff, or, in other words, that plaintiff was entitled to have the same returned to her as the owner thereof after such verdict and judgment from which no appeal was prosecuted. Touching this matter, the court instructed the jury at the instance of plaintiff as follows: "If you believe from and find the evidence that the plaintiff was the owner of and had the possession of the property in controversy; that prior to the commencement of this action the said property was taken from the possession of the plaintiff by a constable acting under the authority of law in a proceeding pending in a justice court; that said

Digitized by Google

property was delivered to and received by the defendants herein from said officer; that thereafter upon a trial and hearing of the proceedings, a judgment was rendered in said cause in favor of the plaintiff and against the defendants, and that no appeal was taken from said judgment, then said cause was fully determined; and in such case the court instructs you that the plaintiff herein was entitled to have said property returned to her by the defendants, and if you find that after the determination of the action instituted by defendants against this plaintiff that they refused and neglected to return said property to her, that she demanded the return thereof, and defendants refused to return the same, such refusal constitutes a conversion of the property and the jury should find for the plaintiff."

It is argued the court erred throughout the trial in so accepting and treating the verdict in replevin as conclusive between the same parties as to plaintiff's right as owner and to have possession of the goods, but we are not so persuaded. Plaintiff introduced evidence tending to prove that she owned the goods, and the case concedes that she had possession thereof under her claim of ownership when the replevin suit was instituted. By the instruction above set forth, it appears the court required the jury to find from the evidence that plaintiff was the owner and had possession of the property at the time of the institution of the replevin suit. But, it is argued, a mere general verdict and judgment for defendant in replevin such as above set out, avails nothing, for the reason the statute requires the jury to find whether the defendant had the right of property or the right of possession only at the commencement of the suit and if either is found in favor of the defendant, then the value of the property should be ascertained and damages for withholding the same. The statute concerning the judgment in replevin is a counterpart only

Digitized by Google

of that which pertains to the verdict or finding of the justice and prescribes the form of the judgment to be entered thereon. The verdict and judgment for a defendant in replevin is not to be treated as a nullity between the parties to the suit, in a collateral proceeding, because of the fact that it fails to find the value of the property, or the value of possession, for such is a right accorded to the prevailing defendant, to the end of recovering damages in lieu of the property, if he so elects. Notwithstanding such omission, he is entitled to his property at any rate. In a case much resembling this one, our Supreme Court said if the verdict in replevin affirmed the right of property in the plaintiff in conversion, it should be treated as sufficient though it omitted to find as well the value of such property or the possession. In other words, the Supreme Court declared that if the verdict in replevin was sufficient to establish the right of property in the defendant in replevin, who subsequently became the plaintiff in conversion, as here, it should be treated as conclusive between the same parties in a subsequent conversion suit though it omitted to find the value of the property or the value of possession. [Caldwell v. Ryan, 210 Mo. 17, 108 S. W. 533.]

Under the authority of that adjudication, there remains, then, for consideration here only the matter of the verdict in replevin being defective in its failure to find whether the defendant therein had the right of property or the right of possession only at the commencement of that suit. Touching this matter, all of the evidence shows that plaintiff here, who was defendant in the replevin suit, was in possession of the property at the time the suit was instituted under a claim of ownership. In this situation of affairs, the defendant here, as plaintiff in replevin, instituted the replevin suit against her. No one can doubt that in replevin the plaintiff must recover on the strength of his own title and not on the weakness

Digitized by Google

of that of the defendant. To maintain replevin, the plaintiff must show a general or special property in himself with respect to the goods in suit. [Wright v. Richmond, 21 Mo. App. 76.] With this burden on the plaintiff in replevin and the fact conceded, as the record here discloses, that the goods belonged to the defendant in replevin, if the plaintiff was not entitled to possession, we believe a general verdict for defendant to be sufficient to determine her mere right of property in the goods conclusively between the same parties for the purpose of a subsequent suit in conversion. In the replevin suit, the burden was on the plaintiff to show that it had a general or special property in the goods which entitled it to the possession and the general verdict returned by the jury affirmed that it had neither. The present case in conversion concedes throughout that the plaintiff, who is the defendant in replevin, claimed the property solely as owner and not under a right of possession only. When this fact is considered, it is obvious the verdict in replevin, though defective, denied the right of the plaintiff in that suit to possession of the property as either a general or special owner thereof and responded to the claim that the defendant there, who is plaintiff here, was the owner. In this view, the court was justified in accepting that verdict and judgment as *res adjudicata* to that extent between the same parties. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.,* and *Caulfield, J.,* concur.

Digitized by Google

# THOMAS KEARNEY, Appellant, v. JOHN A. LAIRD et al., Respondents.

**St. Louis Court of Appeals, March 5, 1912.**

1. **ARREST: Police Officers of City of St. Louis: Right to Make Arrest on Suspicion.** Under the charter of the city of St. Louis, police officers are authorized to arrest persons on grounds of reasonable suspicion that they have committed an offense.

2. **INJUNCTIONS: Officers: Controlling Discretionary Acts.** Where the law casts both a right and a duty upon an officer, involving the exercise of discretion, his conduct with respect thereto is no more to be controlled by injunction than by mandamus.

3. **MUNICIPAL CORPORATIONS: Police Officers: Liability for Misconduct.** Police officers may be prosecuted criminally for an unwarranted abuse of authority, under certain circumstances, and may be required to answer at law for civil damages in other cases.

4 **INJUNCTIONS: Municipal Corporations: Police Officers: Controlling Discretionary Acts.** Public policy forbids the courts to hamper or thwart, by injunctive process, the power and discretion of the police in their performance of the duties cast upon them pertaining to the public weal.

5. **———: ———: ———: ———: Interference with Business: Wagering on Horse Races.** Plaintiff and his clerk, who had previously been bookmakers on a race track, opened a cigar store in the city of St. Louis, to which persons who had followed and patronized horse races resorted for the purpose of placing wagers on horse races, for a commission, at an office maintained by plaintiff for that purpose in a city in another state. After depositing the amount of the wager with the clerk, the customers, acting for themselves, telephoned the wager to plaintiff's office in such other city, by means of a telephone in plaintiff's cigar store. The clerk and these customers had been arrested by the police on several occasions, on suspicion that they were laying wagers on horse races through plaintiff, but none of them were convicted. In an action by plaintiff to enjoin the police from interfering with his business by making these arrests on suspicion, *held*, that plaintiff conducted his store in defiance of sections 4748 and 4749, Revised Statutes 1909, denouncing as a felony the occupying of a building for receiving or recording wagers on horse races and the maintaining of a telephone therein for the purpose of

Digitized by Google

communicating information to any place in this or another state for the purpose of there recording wagers on horse races, etc., and that reasonable grounds of suspicion existed that the customers arrested were aiding and abetting plaintiff in violating the law, authorizing the police to arrest them, under the charter of St. Louis; and hence it is *held* that plaintiff was not entitled to injunctive relief.

Appeal from St. Louis City Circuit Court.—*Hon. William B. Homer,* Judge.

AFFIRMED.

*Frank H. Farris* for appellant.

(1) We admit that as a fundamental proposition injunction will not lie to restrain an arrest, but when the exercise of the arresting power exceeds the warrant and authority of law and goes to the extent of committing irreparable and incalculable damage to a man's property, rights and franchises, then courts of equity may be called upon and will interfere with such action, even though its effect is to enjoin the arrest. Shoe Co. v. Saxey, 131 Mo. 220; State ex rel. v. Zachritz, 166 Mo. 307; Ryan v. Jacobs, Sixth W'k Law Bulletin, p. 139; Railroad v. New York, 1 Hilt (N. Y.), 562; Cullen v. New York, 93 N. Y. Supp. 1085; Kern on Injunction, p. 2. (2) There can be but one reasonable conclusion drawn from the testimony in this case; that the police officers, and, through them, the police department, without any legal evidence, had reached the conclusion that the plaintiff in this case was a violator of the law; and well knowing that they had no legal grounds upon which to prosecute him, and no reasonable grounds upon which to expect a conviction, if prosecution were had, had determined to mete out justice to him as they thought him entitled to; and that justice was to make it impossible for him to engage in a business in the city of St. Louis and carry it on by arresting him, his employees and customers,

Digitized by Google

upon some trumped-up charge, and thereby make it impossible for him to live in the city and engage in any lawful business which he might choose. And we respectfully submit that under the facts and law of this case, the issues should have been found for appellant and equitable relief given to him in the restraint of respondents from further trespass upon his rights by arrests, except upon warrant, or without warrant only when the arresting power, in good faith, in the exercise of reasonable judgment, based upon proof, can say that a crime has been committed by appellant, his employees or those in his premises, or is about to be committed by him or them.

*Lambert E. Walther* and *Robert Burkham* for respondents.

(1) It is not only the right, but it is the duty of police officers to make arrests whenever they have reasonable ground to believe an offense has been committed. State v. Underwood, 75 Mo. 230; State v. Grant, 76 Mo. 236; R. S. 1909, sec. 9805; State v. Hancock, 73 Mo. App. 19; Wehmeyer v. Mulvihill, 150 Mo. App. 197; State v. Boyd, 108 Mo. App. 518; R. S. 1909, sec. 4748; R. S. 1909, sec. 4749; State v. Albright, 144 Mo. 638; Boeger v. Langenberg, 97 Mo. 390. (2) This case is not one of equitable cognizance for the following reasons: (a) A court of equity will not interfere by injunction to restrain or control the exercise of discretion by police authorities in the prevention of crime and in the maintenance of peace. 2 Bouvier Law Dict., p. 691; Black's Law Dict., p. 909; Fruend on Police Powers, sec. 86; R. S. 1909, sec. 9805; 22 Cyc., p. 889; Id., p. 879; 3 Abbott on Municipal Corporations, sec. 1130; Id., sec. 1137; Spelling on Injunctions, sec. 628; Id., sec. 691; Kerr on Injunctions, p. 4; High on Injunctions (4 Ed.), sec. 1326; Gaines v. Thompson, 74 U. S. 352; Decker v. Diemer,

Digitized by Google

229 Mo. 296. (b) Equity has no jurisdiction in criminal matters and will neither enjoin the commission of a crime nor an arrest therefor, nor will equity even inquire whether a crime has been committed. R. S. 1909, sec. 4411; R. S. 1909, sec. 4420; Davis v. Am. Soc., 75 N. Y. 368; Sterman v. Kennedy, 15 Abb. Pr. (N. Y.) 201; Kramer v. Police Dept., 53 N. Y. Sup. Ct. (J. & S.) 492; Campbell v. York, 30 Misc. Rep. 340; Delaney v. Flood, 183 N. Y. 323; Stevens v. McAdoo, 112 N. Y. App. Div. 458; Shepard v. Bingham, 125 N. Y. App. Div. 784; Athletic Club v. Speer, 29 Colo. 158; Adams v. Oyster & Fish Co., 34 Colo. 219; Chicago v. Wright, 69 Ill. 318; Moses v. Mayor, 52 Ala. 208; Caille Co. v. Haager, 50 S. W. (Ky.) 244. (c) Appellant has an adequate remedy at law. Sullivan v. Gas Co., 148 Cal. 368; Fincke v. Police Comm., 66 How. Pr. (N. Y.) 318; Kenny v. Martin, 11 Misc. Rep. (N. Y.) 651; Suesskind & Rehfeldt v. Bingham, Police Com., 125 N. Y. App. Div. 787; Moore v. Owen, 109 N. Y. Supp. 585. (d) Appellant does not come into equity with clean hands and should therefore be denied relief. 1 Pomeroy Eq. Juris. (3 Ed.), sec. 397; Pipe Co. v. Reservoir Co., 111 Fed. 284; Little v. Cunningham, 116 Mo. App. 545; Railroad v. Crothersville, 159 Ind. 330; Beck v. Live Stock Co., 65 Fed. 30; Danciger v. Stone, 187 Fed. 853; Weiss v. Herliby, 49 N. Y. Supp. 81. (3) There is no evidence in the record connecting these respondents with the alleged illegal acts of the police who made the arrests.

NORTONI, J.—This is a suit in equity for injunctive relief. The finding and judgment were for defendants and plaintiff prosecutes the appeal.

Plaintiff is the proprietor of a cigar and tobacco store at 407 Walnut street, St. Louis, and defendants are the board of police commissioners and the chief of police of that city. The police officers of the city had recently before made numerous arrests in plain-

Digitized by Google

tiff's store on suspicion that the persons arrested were laying wagers on horse races through him, and because of this plaintiff instituted the present suit in equity to enjoin further interference by the police with his business. The court granted a temporary injunction, but upon final hearing dissolved it and dismissed the petition. It is from this judgment that plaintiff prosecutes the appeal.

The evidence for plaintiff tends to prove that he conducts a small cigar and tobacco store at the place mentioned, in which he maintains a stock of goods valued at about $600. For him it is shown, too, that the police officers of the city, within the period of two or three months before the institution of this suit, made about twenty arrests in plaintiff's establishment. One of the persons arrested was plaintiff's clerk, McAllister, and he was taken into custody several different times. Others arrested were customers of plaintiff, and it appears that the charge laid against them pertained to betting on horse races through the agency of plaintiff and his clerk, McAllister. None of the persons arrested were convicted but all were finally dismissed of the charges laid against them.

For defendants the evidence is abundant to the effect that plaintiff was a former bookmaker on the race tracks and followed the calling of laying wagers for others on horse racing. His clerk, McAllister, had formerly followed the same calling, and many of those who were arrested about his place were men who, it is said, had followed the races. It is shown that plaintiff kept and sold at his store one solitary publication and that was the Daily Racing Form, which is a paper devoted exclusively to matters connected with horse racing. Plaintiff testified that he sold this paper because it was the only one which his customers desired to purchase. It is shown that plaintiff maintained an office across the river at East St. Louis, Illinois, where he conducted the business of placing

Digitized by Google

wagers on horse races for a commission. There is an abundance of evidence in the record, too, that his clerk, McAllister, accepted deposits of money at the cigar store at 407 Walnut street and communicated, or permitted plaintiff's patrons to communicate, through a telephone therein, the placing of bets on horses at plaintiff's East St. Louis office.

The statutes denounce as guilty of a felony those who occupy any room, tenement, booth or building and engage in the business of receiving, recording or registering bets or wagers on horse races, etc. They denounce as guilty of a felony, too, the act of any person who occupies any room, shed, tenement, tent, booth, building or inclosure, or any part thereof, in this state with any telephone or telegraph instrument, or any apparatus or device of any kind whatsoever, for the purpose of communicating information to any place in this or any other state for the purpose of there recording or registering bets or wagers or selling pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast which is to be made or to take place within or without this state, etc. [Secs. 4748, 4749, R. S. 1909.] The record before us teems with evidence tending to prove that plaintiff maintained his cigar and tobacco store at 407 Walnut street, in part at least, as an agency through which he might negotiate wagers on horse races for his customers. It is shown that people communicated bets and wagers to him in his office in East St. Louis through the telephone from the cigar store, and that others communicated bets to the clerk in charge of the store here through the telephone. According to plaintiff's evidence, the net profits from the small stock of cigars and tobacco, consisting of about $600 in value were $100 per month and the record suggests that his income was augmented from commissions received on the placing of wagers in violation of the statutes above referred to.

Digitized by Google

Though it be true that none of the persons arrested in plaintiff's store were afterward convicted on the charge laid against them, we believe the court did not err in dissolving the injunction and dismissing the bill, for obviously, plaintiff conducted his establishment at 407 Walnut street in defiance of the statute forbidding the like. Besides, under the charter of the city of St. Louis, the police are authorized to arrest persons and take them into custody on grounds of reasonable suspicion. Such is the accepted rule of decision. [See Wehmeyer v. Mulvihill, 150 Mo. App. 197, 130 S. W. 681.] The facts that both this plaintiff and his clerk were former bookmakers on the race tracks, which had recently been outlawed in Missouri by an act of the Legislature, and that plaintiff opened this small cigar store, as he did but recently after the closing down of the race tracks, with a former bookmaker in charge, and operates in conjunction therewith a racing commission office in East St. Louis, suggests a strong suspicion with respect to the establishment and those in charge at least. Those arrested were persons who frequented the place and tarried thereabout with accustomed regularity. Moreover, it is to be noted that the several persons arrested in and about plaintiff's place were men who had followed and patronized the races hereabout, and these and other facts above stated should be regarded as sufficient to give rise to grounds of reasonable suspicion that they were patronizing the place by placing wagers through the means of the telephone so commonly known to be employed for that purpose in plaintiff's establishment. Indeed, the evidence is, that these persons deposited the money to be wagered with plaintiff's clerk, McAllister, and then, acting for themselves, telephoned the bet to plaintiff in East St. Louis through his instrument. It, therefore, appeared these men were using plaintiff's telephone in conforming with his scheme to violate the

Digitized by Google

law. If reasonable grounds of suspicion appeared to the police officers that these parties were aiding and abetting plaintiff in his scheme, then under the law it was not only their right but it was as well their duty to make the arrests complained of. [See State v. Boyd, 108 Mo. App. 518, 84 S. W. 191.] Where the law thus casts both a right and a duty upon an officer or a branch of the government which involves the exercise of discretion, the officer's conduct with respect to that duty or discretion is no more to be controlled by injunction than by mandamus. Such we understand to be the accepted rule of decision established by high authority. [See Gaines v. Thompson, 74 U. S. 347; see, too, High on Injunctions (4 Ed.), sec. 1326; 1 Spelling on Injunctions (2 Ed.), sec. 628.] There may be cases where police officers will be enjoined from illegally doing irreparable injury to the property of an individual through the power of their office, but this is certainly not one of them. Such officers may be prosecuted criminally for an unwarranted abuse of authority in certain circumstances, and may be required to answer at law for civil damages in other cases. But such a question is not one that it is competent for a court of equity to try and determine. It would seem that a sound public policy forbids the courts should interpose by injunctive process to hamper or thwart the power and discretion of the police touching the performance of the duties which the law has cast upon them pertaining to the public weal. A modern standard work thus states the rule: "Police officers will not be enjoined from performing their proper duties in the exercise of the general police power, even though they perform them in an oppressive and unlawful way. But such officers will be enjoined from illegally doing irreparable injury to the property of an individual. Where, however, they act in good faith in warning the public concerning the plaintiff's business, they will not be enjoined." [See

Digitized by Google

22 Cyc., 889, 890.] Mr. Spelling in his excellent work on injunctions and extraordinary remedies says: "No court has jurisdiction to interfere with the public duties of any of the departments of the government, or to override the policy of the state; and a court of equity is without power to enjoin the exercise of the police powers given by law to the officers of a municipal corporation, so as to prevent such officers from preserving the public peace, such for instance as keeping a public street open to public use. Nor will an injunction issue to restrain an interference by the police authorities with the business of a liquor dealer by arresting him and his employees. If the arrests are illegal, *habeas corpus* and suits for damages afford him ample remedy. And an injunction was refused where sought to restrain the police authorities within a metropolitan police district from placing policemen in front of a public house in which guests had been repeatedly subjected to unjust, exorbitant, and illegal charges, and from giving warning to strangers about to enter to be careful. Nor does it alter the case that police supervision is exercised in an arbitrary and unlawful manner. The remedy is by action for damages, or by a criminal prosecution." For adjudications by courts of first importance in affirmance of the doctrine above stated in cases much resembling this one, see Delaney v. Flood, 183 N. Y. 323; Stevens v. McAdoo, 112 N. Y. App. Div. 458; Shepard v. Bingham, Police Commissioner, 125 N. Y. App. Div. 784; see Chicago v. Wright, 69 Ill. 318.

The court very properly declined to interfere with the exercises of the discretion lodged in the police, for under the law it was both their right and duty to act upon grounds of reasonable suspicion which the evidence undoubtedly reveals. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

Digitized by Google

# HENRY LESCHEN, Appellant, v. BENJAMIN BRAZELLE, Respondent.

St. Louis Court of Appeals, March 5, 1912.

1. **EVIDENCE: Carbon Copy.** A carbon copy of a document, made at the same time as and by the impressions that produced the original, is competent evidence in any case in which the original would be competent.

2. **WITNESSES: Attorney and Client: Privileged Communications.** Where a carbon copy of an application for a patent is in the hands of the inventor's attorney, it is privileged, and the attorney cannot be compelled to produce it.

3. ———: ———: ———: **Producing Documents Committed to Attorney.** In a suit for specific performance of a contract to convey a half interest in a patent, plaintiff applied for an order requiring defendant (the patentee) to produce the application for the patent. It appearing that the original application was on file in the patent office, the court made an order, under sections 1944 and 1945, Revised Statutes 1909, requiring defendant to produce a copy of the application, for use in the case. This defendant declined to do, because the copy was in the possession of his attorney and not in his own possession, and he objected to the attorney's producing it because it was privileged. The attorney laid no claim to the paper, nor objected to producing it on his own account, but was willing to furnish it to his client on his request. *Held*, that it was not material that the attorney owned the paper on which the copy of the application was written, and, the copy not being privileged in the hands of defendant, it could not be made privileged by defendant's placing it in the possession of his counsel, and hence an order requiring defendant to recall the copy from his counsel and to then produce it was proper.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED.

*Julian Laughlin* and *A. R. Russell* for appellant.

*Jones, Jones, Hocker & Davis* for respondent.

Digitized by Google

NORTONI, J.—This is a suit in equity for the specific performance of a contract and injunctive relief. It appears defendant is an inventor, and in 1907 plaintiff entered into a contract with him touching a new style internal combustion engine, the invention and patenting of which defendant then had in mind. By the terms of the contract plaintiff was to furnish defendant certain financial aid toward perfecting and patenting the invention, and for this consideration defendant agreed to assign plaintiff one-half interest therein, when completed. The suit declares upon this contract, and prays that defendant be required to specifically perform it by investing plaintiff with one-half interest in two certain patents upon the engine and improvement thereon, Nos. 520,084 and 572,235, and for an injunction restraining defendant from assigning an interest therein to another.

By his answer, defendant admits the arrangement with plaintiff in the first instance, but avers that plaintiff subsequently voluntarily withdrew therefrom and refused to furnish the financial aid agreed upon. It is averred, too, therein that after plaintiff withdrew from the enterprise defendant perfected an internal combustion engine, which was salable, and applied for a patent thereon; that this engine is a success, but that plaintiff is wholly without interest therein for the reason he had long since abandoned his undertaking and refused to furnish the financial aid essential to complete the task in accordance with his agreement. But plaintiff insists that the engine finally perfected as a salable one and known in the record as engine No. 3 is in its fundamental principle identical in all respects with the original, for the development of which he furnished the means, and, therefore, he is entitled to an interest therein. On the issue thus made, it became material and was important to investigate and ascertain the truth with respect to the fundamental principle of the several engines men-

Digitized by Google

tioned. It appears that on the engine known in the record as No. 3, which was finally perfected by defendant as a salable one, at patent had been allowed under the act of Congress, but for some reason not yet issued. Defendant produced a copy of the application No. 520084 for the patent on the engines known as Nos. 1 and 2 in the record.

To the end of showing the identity of the several engines, plaintiff sought to have defendant produce the application for patent No. 572235 containing a full description of the perfected engine known as No. 3. This defendant declined to do, and it being shown that the original of the application was on file in the patent office at Washington, the court thereupon made an order under Secs. 1944, 1945, R. S. 1909, to the effect that defendant produce a copy of such application for use in the case. The copy of the application referred to is admitted to be a carbon copy and shown to have been made at the same time and by the same impressions that produced the original application. It is the accepted rule of decision that such copies may be received in evidence in any case or on any question in which the original writing or print is competent and proper. [See Bond v. Sanford, 134 Mo. App. 477, 114 S. W. 570; Wright v. Chicago, etc., R. Co., 118 Mo. App. 392, 94 S. W. 555.] But this is unimportant here, for the parties have stipulated that the order of the court made on defendant to produce was proper enough unless he was relieved from the duty of complying therewith because of the question of privilege, which he raised. Indeed, this question of privilege is the only matter for our consideration and the facts concerning it are as follows: It is shown, and the case concedes, that the copy of the application for a patent, so ordered to be produced, was in the possession of Mr. Carr, defendant's attorney, who had charge of procuring the patent. Defendant de-



Digitized by Google

clined to produce the carbon copy of the application for the reason it was not in his possession and objected to his counsel's producing it because of the privilege which obtains as to communications between attorney and client. There can be no doubt that Mr. Carr, defendant's attorney, who has the carbon copy of the application in his possession, could not be compelled to produce it, for the reason that the privilege incident to that relation forbids that its sanctity shall be so invaded. [See 1 Greenleaf on Evidence (16 Ed.), sec. 237; State v. Dawson, 90 Mo. 149, 1 S. W. 827.] But there is no attempt here to enforce the production of a copy of the application by defendant's attorney, Mr. Carr, for the order of the court is directed to defendant in person, and it is conceded that if the application were in his possession he should produce it. But it is argued by defendant that though the carbon copy of the application in the possession of Mr. Carr, his counsel, contains information touching his patent and within his dominion, the *paper* on which such information is written belongs to the attorney, Mr. Carr, and, therefore, he has no right to produce it. Though the paper on which the carbon impressions of the original application were made belongs to the attorney, Mr. Carr, as insisted by defendant, the argument advanced is without substance, for Mr. Carr in no respect lays claim to the paper or objects to its production on that score. The privilege involved here and that which is invoked to the end of preventing the production of the copy of the application for consideration in evidence is a privilege which the law affords in favor of defendant as client and not in favor of Mr. Carr, the attorney. [See 1 Greenleaf on Evidence (16 Ed.), secs. 239, 243.] For instance, if defendant here or the client may be required to produce the paper, then his attorney may be required to do likewise though an objection on the grounds of privilege is interposed. [Fenwick v. Reed, 1 Merivale's

Digitized by Google

Rep. 113.] But, however this may be, defendant's attorney, Mr. Carr, claims no privilege whatever on his own account nor does he interpose any objection to furnishing the defendant a copy of the application in his possession on the score that he owns the paper on which the impressions are indited. The matter of the ownership of the paper on which the carbon impressions exist, though put forward by defendant, is but a pretext of shadowy form without substance whatever and should not be regarded in a court of justice when the question in judgment relates alone to a privilege touching the information admitted to be that of defendant contained in and revealed by the paper. Indeed, the record before us concedes that Mr. Carr, defendant's attorney, expresses a willingness to furnish defendant the copy of the application called for upon his request and in no sense asserts his ownership in the paper against the right of defendant to have it. In other words, it is expressly admitted that Mr. Carr has never been requested by defendant to furnish him a copy of the application; that he is perfectly willing to do so and that he withholds it for no other reason than because it has not been requested of him by defendant either before or pending the controversy over the question of privilege. Obviously, on this showing, defendant should be required to obtain possession of the copy of the application and produce it in the case. For no one can doubt that if documents are not privileged while in the hands of a party to the suit, he does not make them privileged by placing them in the possession of his counsel. In such circumstances no doubt the attorney may properly enough refuse to produce the writing, but the client who is party to the suit cannot do so merely because he is prepared to say that he has shown or has delivered them to his attorney. On this question we fully concur in the views expressed in Edison Elect. L. Co. v. U. S. Elect. L. Co., 44 Fed. 294.

Digitized by Google

The judgment requiring defendant to obtain or call back from his counsel the copy of the application and produce it at the trial should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

---

## CHARLES BUSH et al., by ARTHUR L. BUSH, Guardian and Curator, Appellants, v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Respondent.

**St. Louis Court of Appeals, March 5, 1912.**

1. **RAILROADS: Frightening Teams in Highway: Liability.** While the mere opening of the cylinder cock of a locomotive to permit the escape of accumulated steam and water, and the sounding of its whistle in the usual way, before starting up, after a stop at a station, is not negligence, ordinary care should be taken to first ascertain whether there are teams in the highway close at hand, and, if any are discovered, due care should be taken to prevent injury to persons by the frightening thereof.

2. **———: ———: Suit Against Railroad and Engineer: Effect of Verdict for Engineer.** In an action against a railroad company and its engineer for the death of the driver of a team, caused by the team's becoming frightened at steam escaping from the cylinder cock of an engine and the sounding of the whistle thereon, even though the engineer was not negligent, by reason of being unable, because of his position, to see the team before letting off the steam or blowing the whistle, yet the fireman, on the side next to the highway, with an unobstructed view, was guilty of negligence, chargeable to the railroad company, in not looking for the team and communicating its presence to the engineer; and hence the trial court erred in granting the railroad company a new trial on the ground that, the jury having found that the engineer was not negligent, there could be no negligence on the part of the railroad company.

3. **NEW TRIAL: Verdict Against Weight of Evidence: Review of Order: Appellate Practice.** An order granting a new trial on the ground the verdict is against the weight of the evidence may be reviewed and reversed, where there is no conflict

Digitized by Google

in the testimony on the true issue and no substantial evidence in the record to support a verdict for the party awarded the new trial.

4. ———: ———: ———: ———: **Railroads.** In an action against a railroad company and its engineer for the death of the driver of a team, caused by the team's becoming frightened at steam escaping from the cylinder cocks of an engine and the sounding of the whistle thereon, the evidence tended to show that the engineer was in such a position that he was unable to see the team before letting off the steam or blowing the whistle, but that the fireman was in such a position that he could have observed the approach of the team, not more than thirty feet distant from the engine, and could have communicated that fact to the engineer before the cylinder cocks were opened or the whistle was sounded. A verdict was returned in favor of the engineer and against the company, which was set aside, on the company's motion, as being against the weight of the evidence. *Held*, that, in view of the fact that the fault of the fireman was shown and no effort was made to deny it, the act of the court in granting a new trial was an abuse of discretion, and hence it should be reversed.

5. **EVIDENCE: Presumptions: Failure to Call Witness.** No presumption should be indulged from the fact that an employer, sued for personal injuries, fails to call as a witness an employee who was connected with the accident, where it is not shown that he is alive, is still in defendant's employ, or is within the jurisdiction of the court.

Appeal from Monroe Circuit Court.—*Hon. David H. Eby*, Judge.

REVERSED AND REMANDED (*with directions*).

*James P. Boyd* and *Frank W. McAllister* for appellants.

(1) It was defendant's duty to be on the look out for danger to travelers and whenever it became apparent to a reasonable mind that one was in imminent danger from the operation of the engine and the means were at hand to avoid inflicting an injury it was its duty reasonably to employ such means. Feeny v. Railroad, 123 Mo. App. 429; Chamberlin v. Railroad, 133 Mo. 587. (2) Although the engineer is in

Digitized by Google

the control and management of the engine, yet if the fireman is negligent in the performance of his duties under the supervision of the engineer and injury results the railroad company is liable. Suydam v. Moore, 8 Barb. (N. Y.) 358; Railroad v. Hunt, 59 Vt. 294.

*Lee W. Hagerman* for respondent.

This court, under the evidence in this case, as shown in appellant's abstract and in respondent's counter abstract, will not say that the trial court's discretion in this matter was not sound and justly exercised. Van Liew v. Barrett Co., 144 Mo. 515; Rud v. Ins. Co., 58 Mo. 428; Milling Co. v. Bogges, 80 Mo. App. 297; Parker v. Cassinfamm, 130 Mo. 348; Thompson v. Railroad, 140 Mo. 144; Bank v. Wood, 124 Mo. 72; Miller v. Railroad, 217 U. S. 209.

NORTONI, J.—This is a suit for damages accrued to plaintiffs on account of the alleged negligence of defendants. The Missouri, Kansas & Texas Railway Company and its locomotive engineer, John Kenna, are jointly sued as defendants. Plaintiffs are the minor children of Joseph D. Bush, and prosecute the suit under the statute by Arthur L. Bush, their guardian and curator, for the wrongful death of their father, which, it is alleged, was occasioned through the joint negligence of the two defendants. On a trial of the issue, the jury awarded plaintiffs a recovery of $2500 against defendant, Missouri, Kansas & Texas Railway Company, and gave a verdict for defendant, John Kenna, its locomotive engineer. On the motion of defendant, Missouri, Kansas & Texas Railway Company, the court set the verdict against it aside and granted a new trial, and from this order plaintiffs prosecute the appeal.

Plaintiffs' father, Joseph D. Bush, was thrown from his buggy and fatally injured because of the al-

Digitized by Google

leged fright of his team through the negligent handling of defendant's locomotive by John Kenna, its engineer, and the fireman thereon. It is said defendant's railroad runs through the town of Stoutsville almost directly east and west. Broadway, a public thoroughfare in the town of Stoutsville, runs parallel with defendant's right of way and along and adjacent to the north side thereof. At one place in Broadway a bluff of considerable proportion extends across the platted street, so that it is impossible to drive over the same. In other words, a portion of Broadway, though platted and dedicated to public use, is not made into a street susceptible of travel, and, therefore, those passing east and west thereon drive around the bluff out of the platted street and upon defendant's right of way to within about thirty feet of its tracks. This portion of the thoroughfare, which by user and common consent has been extended over upon the railroad right of way to within about thirty feet of the railroad tracks, has been improved and occupied as a street for a number of years with the knowledge and consent of defendant railroad company. People constantly drive to and fro thereon identically as they do on other streets in Stoutsville, and it appears both defendants, the railroad, and John Kenna, the locomotive engineer, knew of this practice.

Defendant John Kenna is a locomotive engineer in the employ of defendant railway company and engaged in the service of operating the locomotive which "draws" a local freight train. On the day in question, defendant's local freight, with locomotive in charge of John Kenna attached, and headed to the east, was standing still on the tracks at the station when Joseph D. Bush, who was driving his team and buggy westward on Broadway, turned upon defendant's right of way, over the usual and customarily traveled road, to within about thirty feet of the locomotive. As Bush thus approached the standing locomotive, the

Digitized by Google

cylinder cocks were suddenly opened with the purpose to move the train forward, and great clouds of steam emitted therefrom. This sudden emission of steam, together with the loud hissing and buzzing incident thereto, frightened the team of horses, so that they became unruly and were lunging and pitching with considerable effort when defendant Kenna, the engineer, suddenly sounded two sharp, shrill blasts of the whistle attached to the engine. Upon the sudden sounding of the two blasts from the whistle, the horses became terrorized and plunged forward with such force as to overcome all efforts put forward by Bush to control them, and threw him out of the buggy to a fatal injury, and ran away. Mr. Bush was thrown against the roadside with such force as to inflict a fatal injury upon his head, from which he died two days thereafter.

As before said, both the railway company and its engineer, Kenna, are pursued as defendants as for a joint tort, but the petition contains averments of negligence with respect to other agents and servants of defendant railway company as well. The theory of the petition is, that both defendant railway company and its locomotive engineer, Kenna, were negligent and omitted to exercise due care, with respect to the rights of Joseph D. Bush, when his position of peril was, or might have been, seen, by emitting the steam and sounding the two sharp blasts of the whistle, which occasioned the team to precipitate him to his fatal injury. Touching this matter, the evidence tended to prove, and, in fact, is all one way to the effect, that defendant Kenna was wholly unaware of the presence of Mr. Bush on the roadway near by and of his situation of peril brought about through the fright of the horses, occasioned from the escaping steam at the cylinder cocks. As before stated, Mr. Bush was driving to the westward and the locomotive engine was headed to the east. Defendant Kenna occupied his place at the throttle on the right, or south, side of the

Digitized by Google

cab of the locomotive, and it was impossible for him to see the peril of Mr. Bush who at the time was to the northeast of him in the street. It is to be remembered the locomotive and train were standing at the station and had been so standing for as much as fifteen to twenty minutes. Upon receiving a signal from the conductor, defendant Kenna, the engineer, opened the cylinder cocks to permit the condensed steam and water to escape therefrom, as is usual before starting, and immediately thereafter sounded the locomotive whistle, as was proper enough under ordinary circumstances. Of course, there was no breach of duty on the part of either defendant in merely opening the cylinder cocks to permit the escape of accumulated steam and water or in sounding the whistle in the usual way before starting, for the railroad company may certainly do those things which are essential to the performance of its office in the customary way. But though such be true, the precepts of ordinary care for the safety of others in the thoroughfare would suggest that the cylinder cocks be not suddenly opened and the whistle sharply and suddenly sounded by the engineer at such a place, without first exercising ordinary care to ascertain the presence of passing teams in the road so near. If the presence of a passing team is discovered, due care should be exercised to avert injury to others. [Brown v. Mo. Pac. Ry. Co., 89 Mo. App. 192.]

While the case in its present posture concedes, and the verdict affirms, that Kenna, the engineer, was personally free from negligence in failing to observe the presence of Bush in the street, for it seems his view was obstructed, and in so sharply sounding the whistle, there is evidence suggesting the fireman should have known the true state of affairs. Notwithstanding this, the court set the verdict aside on the motion of defendant railroad for two reasons revealed in the record as follows: Because if defendant Kenna was

Digitized by Google

not negligent, as found by the jury, then there was no negligence on the part of defendant railroad company touching the same matter; and, second, because the verdict is against the evidence and the weight of the evidence.

The first ground assigned for setting aside the verdict implies that defendant could be negligent through the default of Kenna, the engineer, only. Because of this, it is argued the court erred and the verdict should be reinstated for the reason that, though the engineer was not negligent, defendant railway company was properly required by the verdict to answer for the fault of its fireman in omitting to observe the team and communicate the fright of the horses to the engineer in time to have prevented the sounding of the whistle. But it is urged on the part of defendant that as the court assigned as one ground for setting aside the verdict that it was against the evidence and the weight of the evidence, its discretion touching this matter is not open to review here. There can be no doubt that numerous authorities declare the rule in a general way that where the court sets the verdict aside because in its judgment it is against the weight of the evidence, the discretion touching the matter will not be reviewed on appeal unless it appears that such discretion was abused or arbitrarily exercised. But the rule thus frequently stated in general terms is more or less qualified by the effect of other decisions which declare that the appellate court will not review the action of the trial court in granting one new trial on the weight of the evidence in those cases only where there is a conflict in the testimony and substantial evidence touching the issue appears in favor of the party to whom the new trial is awarded. [See Loftis v. Met. St. R. Co., 220 Mo. 470, 119 S. W. 942; Friestatt Milling Co. v. Boggess, 80 Mo. App. 296; Rigby v. St. Louis Transit Co., 153 Mo. App. 330, 133 S. W. 110.] In other words, if there is no conflict in the

Digitized by Google

testimony touching the true issue and there appears in the record no substantial evidence in support of a verdict in favor of the party to whom the new trial is awarded, the appellate court will review the matter and may reinstate the verdict if it is found proper to do so. [See Ordelheide v. Berger Land Co., 208 Mo. 239, 106 S. W. 620.] Conceding for the purpose of the case that defendant Kenna was wholly unable to see or discover Mr. Bush and his team on the street, there is ample evidence from which the jury were authorized to find defendant's fireman was remiss in his duty to make observations for those on the thoroughfare and communicate the fact to the engineer. It is shown that the fireman was at the north side of the cab of the engine where the view was open to the approach of Bush, not more than fifty feet away at the time. Whether the fireman did or did not observe the approaching team is wholly unimportant here, for no one can doubt his duty to exercise ordinary care to that end and promptly communicate the result of his observations to the engineer. His carelessness touching this obligation is sufficient to cast liability against defendant railway company for the death of Bush resulting directly therefrom, and it appears he made no attempt to warn the engineer. About the fireman's situation in plain view of the approaching team, there is no controversy or conflict in the case. Indeed, touching this matter there is not a scintilla of evidence tending to show that the fireman was not negligent as to the duty to exercise ordinary care to look out for the safety of Bush. This being true, the action awarding a new trial for the reason it was against the evidence and the weight of the evidence is not only open to review here but should be treated with as an abuse of discretion on the part of the trial court. Obviously the verdict is not against the evidence nor the weight of the evidence when the fault of the fireman is shown and no one attempts to deny it. The fireman himself

Digitized by Google

was not placed upon the stand, but from this no presumption should be indulged, for there is no showing as to whether he still lives, is in defendant's employ or within the jurisdiction of the court.

Though the jury found defendant Kenna was not guilty of negligence because of the fact that his view was obstructed and that he was engaged in watching for signals from the conductor in the rear, there is enough in the case to entail liability against the railway company for the fault of the fireman. The order granting a new trial should, therefore, be reversed and the cause remanded with directions to the trial court to reinstate the verdict and enter judgment thereon as of the date the verdict was returned. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

---

## MUNICIPAL ENGINEERING AND CONTRACTING COMPANY, Appellant, v. BANK OF WEBSTER GROVES, Respondent.

**St. Louis Court of Appeals, March 5, 1912.**

**APPELLATE PRACTICE: Failure to File Brief: Dismissal of Appeal. Where appellant's time for filing his brief is extended by the court, and he fails to file it within such time, the appeal will be dismissed, under Rule 21 of the St. Louis Court of Appeals.**

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney,* Judge.

APPEAL DISMISSED.

*Geo. W. Lubke* and *Geo. W. Lubke, Jr.*, for appellant.

*J. H. Tremblay* for respondent.

Digitized by Google

NORTONI, J.—In this case the finding and judgment were for defendant and plaintiff prosecutes the appeal therefrom to this court.

Plaintiff prepared and filed its abstract of the record in due time but omitted to print and file a brief as the rules require. However, when the appeal came on for hearing on February 6, appellant appeared and requested that the court should take it as submitted on briefs and grant it ten days' time within which to prepare and file its brief and argument. The appeal was thus taken under submission and ten days' leave from February 6th granted to plaintiff to prepare and file its brief in aid thereof. That time expired on February 15th and no briefs were filed. Defendant at the same time was granted ten days' time to file its brief after the filing of that for plaintiff. The time granted to defendant has also expired. No briefs have been filed by either party though the leave granted therefor has long since expired, and there is, therefore, no assignment of errors on the record for review. The appeal should, therefore, be dismissed and it is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

---

## JOHN E. MARSHALL, Respondent, v. ESTATE OF SAMUEL SHOEMAKER, Appellant.

**St. Louis Court of Appeals, March 5, 1912.**

1. **APPELLATE PRACTICE: Proceedings for Appeal Liberally Construed.** While an affidavit for appeal must substantially comply with the statute, the precedent steps for an appeal should be liberally construed with a view to sustain the appeal.

2. **———: Defective Affidavit for Appeal: Necessity of Objecting Below.** An appeal will not be dismissed because the affidavit for appeal was sworn to before the judgment was rendered, contrary to the procedure contemplated by the statute, where the trial court's attention was not called to the defect.

Digitized by Google

3. ———: **Affidavit for Appeal: Time for Making.** The statute requiring an affidavit for appeal (section 2040, Revised Statutes 1909) does not contemplate the making of the affidavit before the judgment appealed from is rendered, and such a course is highly improper and would justify a refusal by the trial court to grant an appeal.

4. ———: **No Bill of Exceptions: Dismissal of Appeal.** The failure to file a bill of exceptions is not ground for dismissing the appeal, inasmuch as the record proper would still be before the court for review.

5. ———: ———: **Review of Record Proper: Executors and Administrators.** On appeal to the circuit court from an order of a probate court, rejecting the vacation appointment of the party appealing, as administrator of an estate, pursuant to section 9, Revised Statutes 1909, and appointing another as such administrator, a judgment of the circuit court, adjudging that said order of the probate court be set aside, was sufficient, even in the absence of a bill of exceptions, to warrant consideration by the Court of Appeals of the question as to the right of the administrator, appointed in vacation, to appeal from the order of the probate court, made in term, rejecting the vacation appointment.

6. **EXECUTORS AND ADMINISTRATORS: Refusal to Appoint Applicant: Probate Courts: Appealable Orders.** The right of appeal in probate matter is determined solely by section 289, Revised Statutes 1909; and, under it, an appeal does not lie from an order refusing to appoint one administrator of an estate in the first instance.

7. ———: **Vacation Appointment: Tenure of Office.** The term of one appointed administrator of an estate, in vacation of the probate court, pursuant to section 9, Revised Statutes 1909, extends only to the convening of the court in term and until the court either confirms or rejects the appointments.

8. ———: ———: **Refusal to Confirm: Probate Courts: Appealable Orders.** Section 9, Revised Statutes 1909, provides that the probate court, or the clerk or judge thereof in vacation, "subject to the confirmation or rejection of the court," shall grant letters of administration. Subdivision 9 of section 289, Revised Statutes 1909, gives a right of appeal from all orders revoking letters of administration, and subdivision 15 provides that the right of appeal therein given shall extend to any heir, creditor or other person having an interest in the estate being administered. *Held*, that an administrator appointed in vacation had no right, under the statutes, to appeal from an order of the probate court, made in term, rejecting the vacation appointment; there being no "revocation" of

Digitized by Google

letters of administration, within subdivision 9, and the vacation appointment not having vested the appointee with an interest authorizing an appeal under subdivision 15.

Appeal from Scott Circuit Court.—*Hon. Henry C. Riley,* Judge.

REVERSED.

*Boone & Lee* and *Albert DeReign* for appellant.

The action of the probate court was purely ministerial and the appeal granted by it was unauthorized by statute. State ex rel. v. Guinotte, 113 Mo. App. 399; State ex rel. v. Fowler, 108 Mo. 465; Flick v. Schenck, 212 Mo. 275.

*Barbour & McDavid* and *M. Arnold* for respondent.

It is conceded that an appeal does not lie from the action of the probate court appointing or refusing to appoint an administrator. But here an administrator had been appointed; under the appointment he had qualified, taken charge of the estate, and was in full exercise of his duties as administrator, when the appointment was revoked or "rejected." This revocation worked a divestiture of respondent's legal title to the entire assets of the estate in his hands. Cuendet v. Henderson, 166 Mo. 667. Previous to this, his letters and all his proceedings thereunder were valid. Macy v. Stark, 116 Mo. 481. (2) Furthermore, as, in the view of the respondent, the appeal was not taken from the action of the court in granting or refusing letters of administration, if it be contended also that the appeal was not taken from an order revoking letters of administration, then it is submitted that the appeal is fully warranted by the 15th and last clause of section 289, Revised Statutes 1909, inasmuch as the action of the probate court was a final decision di-

Digitized by Google

vesting respondent of his previous legal title in the estate. Section 50, Revised Statutes 1909, cited by appellant, does not include all causes for revocation of letters of administration that are appealable. This power is inherent in the court, and the authorities cited by appellant fully sustain this position. McCabe v. Lewis, 76 Mo. 296; In re Huckstep Estate, 5 Mo. App. 582. (3) Respondent insists that this appeal be dismissed, because the bill of exceptions was not filed within the time allowed by the court. Mitchell v. Williams, 79 Mo. App. 389; Weil v. Jones, 70 Mo. 560; Smith v. Emerson, 107 Mo. App. 208; Powell v. Sherwood, 162 Mo. 605; Grayham v. DeQuire, 154 Mo. 88; Stewart v. Brown, 112 Mo. 171. The rule controlling matters of this character is aptly expressed in Fulkerson v. Murdock, 123 Mo. 296, as follows: "Under repeated rulings of the Supreme Court and of each division, the statute on this subject must be regarded as an imperative demand that exceptions be filed within the time the law prescribed . . . and this is true even though all parties thought it was in time." State v. Mayor, 99 Mo. 602; Burdoin v. Trenton, 116 Mo. 358; Dorman v. Coon, 119 Mo. 68; Wine Co. v. Buzzard & Buzzard, 144 Mo. App. 340; Linihand v. Barley, 124 Mo. 560.

PER CURIAM.—The appeal in this case was prosecuted to this court, but was thereafter transferred by it to the Springfield Court of Appeals under the provisions of the act of the Legislature, approved June 12, 1909. [See Laws of Missouri 1909, p. 396; see, also, Sec. 3939, R. S. 1909.] In due time the cause was disposed of by the Springfield Court of Appeals through the subjoined opinion prepared by Judge Cox of that court, but its opinion was ordered not to be published in the official reports for the reason that about the same time the Supreme Court declared the legislative act, which purported to author-

Digitized by Google

ize the transfer of cases from one court of appeals to another for hearing and determination, to be unconstitutional. The cause was thereafter transferred by the Springfield Court of Appeals to this court on the theory that the jurisdiction of the appeal continued to reside here and the proceedings had in the Springfield Court with reference thereto were *coram non judice.*

The case has been argued and submitted here and duly considered. On an examination of the several arguments advanced, we are prepared to concur in the views expressed by the Springfield Court in the unpublished opinion of Judge Cox which we find in the files. That opinion is adopted as the opinion of this court. It is as follows:

"On March 1, 1909, the judge of the probate court of Scott county in vacation, appointed John E. Marshall, plaintiff, administrator of the estate of Samuel Showmaker 'subject to the action of the court in term time.' On March 6, 1909, Nannie Showmaker, widow of deceased, filed what she denominated a motion to revoke the letters of administration granted by the judge of the court in vacation to plaintiff. On March 12, this matter was heard and the court, then in session, made the following order:

" 'ACTION OF JUDGE REJECTED.

" 'Estate of Samuel Showmaker, deceased.

" 'Samuel Tanner, Public Administrator.

" 'It is ordered by the court that the action of the judge of this court, in vacation of court, in granting letters of administration, is hereby rejected by the court and for naught held. And now comes Nannie Showmaker, widow of said deceased, and here in open court waives the issuing of citation herein. Whereupon it is ordered by the court that Samuel Tanner, public administrator of Scott county, be and he is



Digitized by Google

hereby ordered to take charge of and administer said estate according to law.'

"From this order the plaintiff, Marshall, appealed to the circuit court, where a trial was had at the October term, 1909, and the following judgment rendered:

"'Now on this third day of November, 1909, come the parties by their respective attorneys and this cause having heretofore been submitted to the court on the 29th day of October, 1909, and by the court taken under advisement, and the court being now fully advised in the premises doth find the issues for the plaintiff, and the court doth order and adjudge that the order of the probate court of Scott county, Missouri, in rejecting the plaintiff, John E. Marshall, as administrator of said estate and the order of said probate court in appointing Samuel Tanner, public administrator, as administrator of said estate, be and the same are hereby set aside, and it is further ordered by the court that this judgment be certified to said probate court. And it is further ordered and adjudged by the court that the plaintiff recover of said estate the costs in this action expended and have execution therefor.'

"From this judgment defendant Tanner, as administrator, has appealed to this court.

"Contention is made in this court that this appeal should be dismissed for the reason that the affidavit for appeal is insufficient. The judgment in this case was rendered on the third day of November, 1909; motion for new trial was filed and overruled on the same day and the affidavit for appeal was filed on the same day. The affidavit for appeal shows upon its face that it was sworn to before the circuit clerk of Mississippi county on November 2d. Respondent contends that the fact that the affidavit was sworn to before the judgment was rendered makes it a nullity as far as this case is concerned, hence, it is not such an affidavit as the statute requires. The statute re-

Digitized by Google

quires an affidavit for appeal to be filed, and it has been held that the order of the circuit court granting an appeal is not of itself sufficient to confer jurisdiction upon the appellate court, but that an affidavit for appeal in substantial compliance with the statute is essential to such jurisdiction. While this is true a liberal construction should be placed upon the precedent steps with a view to sustain the appeal. [State ex rel. Broaddus, 210 Mo. 1, 108 S. W. 544.]

"The attention of the trial court was not called to the defect in the affidavit by respondent, and no objection to the appeal being granted upon this affidavit was made by him, and hence to dismiss this appeal now by reason of a defective affidavit would be to convict the trial court of error which it did not commit, for it was not asked to pash upon the sufficiency of this affidavit, and if it did pass upon it, no objection or exception to its action was taken. In State ex rel. Broaddus, supra, at page 16, in discussing the necessity of calling the attention of the trial court to defects in the affidavit for appeal, the following language is used:

" 'No point was made against the sufficiency of the affidavit in the court from which the appeal was taken, and where, in all fairness to the trial court and the appellant, the objection to the affidavit should have been made; otherwise, an appellee or his attorney might remain silent, knowing that an invalid affidavit for the appeal was being, or had been, filed, and afterwards take advantage of his adversary by raising an objection to it for the first time in the Court of Appeals, knowing that, under the rulings of that court, it could not be amended.'

"With this we fully concur, and shall hold that because the attention of the trial court was not called to the alleged defect of this affidavit for appeal we shall refuse to dismiss the appeal. We do not wish to be understood, however, as approving the practice

Digitized by Google

of making affidavits for appeal before the judgment is rendered. On the other had we want to express our strong disapproval of such a practice. The statute requiring an affidavit for appeal to be filed presupposes that the party making it will act in good faith and that he shall believe what he swears to to be true when he swears to it, and in a case like this wherein the affidavit is made before the court has decided the case it is apparent on the face of it that the affidavit was not based upon facts within the knowledge of the affiant at the time the affidavit was made, and had the trial court's attention been called to this fact he might very properly have refused to grant an appeal upon this affidavit for that reason.

"It is also contended that the appeal should be dismissed because the bill of exceptions was not filed in proper time. The failure to file a bill of exceptions is not a ground for dismissing an appeal. [Wait v. Railroad, 204 Mo. 491, 103 S. W. 60.] Even though there be no bill of exceptions the record proper is still before us for review, and in the view we take of this case it will not be necessary to pass upon the question as to whether the bill of exceptions was properly filed. If we discard the bill of exceptions, yet the judgment rendered by the circuit court in this case shows upon its face that the matter investigated upon the trial in the circuit court was the action of the probate court in 'rejecting the plaintiff, John E. Marshall, as administrator of the said estate and the order of said probate court in appointing Samuel Tanner, public administrator, as administrator of said estate.' This is sufficient to bring to our attention the vital question involved in this appeal, which is the right of an administrator, appointed in vacation, to appeal from the order of the probate court, made in term time thereafter, rejecting his vacation appointment, and it is to this question that we shall direct our attention.

Digitized by Google

"The statute, now section 289, Revised Statutes 1909, provides, in detail, for appeals from the orders and judgments of a probate court, and this being true, the right of appeal in probate matters must be determined from the statute alone. [State ex rel. Grover v. Fowler, 108 Mo. 465, 18 S. W. 968.]

"The statute aforesaid recites fourteen specific grounds of appeal among which is the following:

" '9th. On all orders revoking letters testamentary, or of administration.'

"This provision means just what it says and no more. An appeal does not lie from an order refusing to appoint a person as administrator of an estate in the first instance. [State ex rel. Grover v. Fowler, supra; Flick v. Schenck, 212 Mo. 275, 110 S. W. 1074.] It is only when letters have been revoked that a party can appeal under this subdivision. Were the letters of plaintiff Marshall revoked? We think not. His appointment in the first instance was made by the probate judge in vacation under what is now section 9, Revised Statutes 1909, which is as follows:

" 'Sec. 9. Letters, by Whom Granted.—The probate court, or the judge or clerks thereof, in vacation, subject to the confirmation or rejection of the court, shall grant letters testamentary and of administration.'

"The plaintiff had no interest in the estate and no vested right in the administration. Under the terms of the statute his appointment was only temporary and when made was "subject to the confirmation or rejection of the court." When the court convened, his appointment, made in vacation, was rejected, and thus his term of service expired by limitation. The term for which he was appointed could only extend to the convening of the court in term and until the court should either confirm or reject it. When the court rejected the vacation appointment, plaintiff's right to administer ceased. There is no more reason

Digitized by Google

for holding that the court's discretion in rejecting a vacation appointment could be reviewed upon appeal than there is for holding that the court's discretion in refusing to appoint an applicant when the application is made in term time, can be so reviewed, and it has been expressly held that this cannot be done. [Flick v. Schenck, supra.]

"It is contended, however, that an appeal is allowable under the fifteenth subdivision of the statute aforesaid, which is as follows:

" '15th. And in all other cases where there shall be a final decision of any matter arising under the provisions of article I to XIII, inclusive, of this chapter. And the right of appeal herein provided for shall extend to any heir, devisee, legatee, creditor or other person having an interest in the estate under administration.'

"In support of this contention it is insisted that upon the appointment of plaintiff as administrator in vacation the title of the personal estate of the deceased became immediately vested in him, and that this gave him such an interest in the estate as would bring him within the purview of the fifteenth subdivision aforesaid. With this we do not agree. While it is true that his appointment in vacation did vest him with title to the personal estate, he was only so vested in his official capacity, and as an individual he had no interest in it whatever. As stated before his appointment in vacation was of a temporary nature only and could extend only to such time as the court in term should pass upon it. Had the court confirmed his appointment he would have been invested with a vested right to serve as administrator of that estate, and if thereafter his letters had been revoked, he could, by express provision of the statute, have appealed from the order of revocation; but the provision of the statute for vacation appointments of administrators is in the nature of an emergency provision in

Digitized by Google

order that the estates of deceased persons may be preserved until the court shall convene and, as a court, provide for administration, and when the court rejects a vacation appointment the rights of the appointee, thus rejected, cease.

"Our conclusion is, that plaintiff's rights in connection with this estate ceased when the probate court in term rejected his appointment as administrator made in vacation, and that no appeal will lie from that order; hence, the circuit court, in this case, was without jurisdiction, and its judgment setting aside the order of the probate court and directing the appointment of plaintiff as administrator was a nullity, and could not affect the right of the public administrator appointed by the probate court in term time to administer upon the estate.

"It follows that the judgment of the circuit court should be reversed and it is so ordered."

For the reasons given in that opinion the judgment will be reversed. It is so ordered. All concur.

---

WINIFRED SMITH, Appellant, v. KARL M. SMITH, Respondent.

**St. Louis Court of Appeals, March 5, 1912.**

**The opinion of the Springfield Court of Appeals in this case (151 Mo. App. 649) is adopted as the opinion of the court.**

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow,* Judge.

REVERSED AND REMANDED.

Digitized by Google

*Pearce, Davis & Curlee* for appellant.

*T. J. Rowe, Thos. J. Rowe, Jr.,* and *Henry Rowe* for respondent.

PER CURIAM.—The appeal in this case was prosecuted to this court, but was thereafter transferred by it to the Springfield Court of Appeals under the provisions of the act of the Legislature, approved June 12, 1909. [See Laws of Missouri 1909, p. 396; see, also, Sec. 3939, R. S. 1909.] In due time the cause was disposed of by the Springfield Court of Appeals through an opinion prepared by Judge Cox of that court, as will appear by reference to Smith v. Smith, 151 Mo. App. 649, 132 S. W. 312. Subsequently, the Supreme Court declared the said legislative act, which purported to authorize the transfer of cases from this court to the Springfield Court, to be unconstitutional. The cause was thereafter transferred by the Springfield Court of Appeals to this court on the theory that the jurisdiction of the appeal continued to reside here and the proceedings had in the Springfield Court with reference thereto were *coram non judice.*

The case has been argued and submitted here and duly considered. Upon reading the record and considering the arguments, we are persuaded that the opinion of the Springfield Court, above referred to, properly disposes of the controversy, and it is adopted as the opinion of this court. For the reasons given in that opinion the judgment will be reversed and the cause remanded. All concur.

Digitized by Google

BARNEY, BERKBIEGLER, Respondent, v. CAPE GIRARDEAU AND CHESTER RAILWAY CO., Appellant.

St. Louis Court of Appeals, March 5, 1912.

1. **SPRINGFIELD COURT OF APPEALS OPINION ADOPTED.** The opinion of the Springfield Court of Appeals in this case (152 Mo. App. 543) is adopted as the opinion of the court.

2. **APPELLATE PRACTICE: Reviewing Instructions: Necessity of Exception.** An instruction will not be reviewed on appeal, where no exception to the giving of the same was saved.

Appeal from Perry Circuit Court.—*Hon. Charles A. Killian,* Judge.

AFFIRMED.

*Giboney Houck* and *Davis & Hardesty* for appellant.

*Edward Robb* for respondent.

PER CURIAM.—The appeal in this case was prosecuted to this court, but was thereafter transferred by it to the Springfield Court of Appeals under the provisions of the act of the Legislature, approved June 12, 1909. [See Laws of Missouri 1909, p. 396; see also, Sec. 3939, R. S. 1909.] In due time the cause was disposed of by the Springfield Court of Appeals through an opinion prepared by Judge Cox of that court, as will appear by reference to Berkbiegler v. Railroad, 152 Mo. App. 543, 133 S. W. 1170. Subsequently, the Supreme Court declared the said legislative act, which purported to authorize the transfer of cases from this court to the Springfield Court, to be unconstitutional. The cause was thereafter transferred by the Springfield Court of Appeals to this

Digitized by Google

court on the theory that the jurisdiction of the appeal continued to reside here and the proceedings had in the Springfield Court with reference thereto were *coram non judice.*

The case has been argued and submitted here and duly considered. Upon reading the record and considering the arguments, we are persuaded that the opinion of the Springfield Court, above referred to, properly disposes of the controversy, and it is adopted as the opinion of this court. We do not, however, adopt and accept the reason given in that opinion for not reviewing the court's action in giving instructions, that "the record does not show that any *objection* was made" to such giving of instructions. Our reasons for not reviewing the court's action in that regard are that no *exception* was saved to the action of the court in giving instructions and that the defendant has in this court expressly waived the assignment of error based upon such action. For the reasons given in that opinion as modified by this one the judgment should be affirmed. It is so ordered. All concur.

---

AMERICAN HARDWOOD LUMBER CO., Appellant, v. R. K. DENT, Respondent.

**St. Louis Court of Appeals, March 5, 1912.**

The opinion of the Springfield Court of Appeals in this case (151 Mo. App. 614) is adopted as the opinion of the court.

Appeal from St. Louis City Circuit Court.—*Hon. Robert M. Foster,* Judge.

REVERSED AND REMANDED.

*Julius T. Muench* for appellant.

*Pearce, Davis & Curlee* for respondent.

Digitized by Google

PER CURIAM.—The appeal in this case was prosecuted to this court, but was thereafter transferred by it to the Springfield Court of Appeals under the provisions of the act of the Legislature, approved June 12, 1909. [See Laws of Missouri 1909, p. 396; see, also, Sec. 3939, R. S. 1909.] In due time the cause was disposed of by the Springfield Court of Appeals through an opinion prepared by Judge Cox of that court, as will appear by reference to American Hardwood Lumber Co. v. Dent, 151 Mo. App. 614, 132 S. W. 320. Subsequently, the Supreme Court declared the said legislative act, which purported to authorize the transfer of cases from this court to the Springfield Court, to be unconstitutional. The cause was thereafter transferred by the Springfield Court of Appeals to this court on the theory that the jurisdiction of the appeal continued to reside here and the proceedings had in the Springfield Court with reference thereto were *coram non judice.*

The case has been argued and submitted here and duly considered. Upon reading the record and considering the arguments, we are persuaded that the opinion of the Springfield Court, above referred to, properly disposes of the controversy, and it is adopted as the opinion of this court. For the reasons given in that opinion the judgment should be reversed and the cause remanded. It is so ordered. All concur.

Digitized by Google

T. M. OTRICH, Respondent, v. ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY CO. et al., Appellants.

St. Louis Court of Appeals, March 5, 1912.

The opinion of the Springfield Court of Appeals in this case (154 Mo. App. 420) is adopted as the opinion of the court.

Appeal from Scott Circuit Court.—*Hon. Henry C. Riley,* Judge.

REVERSED AND REMANDED.

*J. F. Green* and *Robert A. Anthony* for St. Louis, Iron Mountain & Southern R. R. Co., Appellant; *S. H. West* and *Wammack & Welborn* for St. Louis Southwestern Ry. Co., Appellant.

*J. R. Young* for respondent.

PER CURIAM.—The appeal in this case was prosecuted to this court, but was thereafter transferred by it to the Springfield Court of Appeals under the provisions of the act of the Legislature, approved June 12, 1909. [See Laws of Missouri 1909, p. 396; see, also Sec. 3939, R. S. 1909.] In due time the cause was disposed of by the Springfield Court of Appeals through an opinion prepared by Judge NIXON of that court, as will appear by reference to Otrich v. Railroad, 154 Mo. App. 420, 134 S. W. 665. Subsequently, the Supreme Court declared the said legislative act, which purported to authorize the transfer of cases from this court to the Springfield Court, to be unconstitutional. The cause was thereafter transferred by the Springfield Court of Appeals to this court on the theory that the jurisdiction of the appeal continued to reside here and the proceedings had in the Springfield Court with reference thereto were *coram non judice.*

Digitized by Google

The case has been argued and submitted here and duly considered. Upon reading the record and considering the arguments, we are persuaded that the opinion of the Springfield Court, above referred to, properly disposes of the controversy, and it is adopted as the opinion of this court. For the reasons given in that opinion the judgment will be reversed and the cause remanded. All concur.

---

## J. G. LYNN, Respondent, v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN RAILWAY COMPANY, Appellant.

**Springfield Court of Appeals, April 1, 1912. Motion for Rehearing Overruled, May 6, 1912.**

1. **RAILROADS: Killing Animals: Failure to Fence: Sufficiency of Evidence.** In an action under the double damage statute for the killing of two of plaintiff's horses, it appeared that the horses were found dead on defendant's right of way and plaintiff's evidence, when fairly considered, and by reasonable inferences therefrom, is *held* sufficient to show that the animals entered upon defendant's right of way through the gap in the wing fence a quarter of a mile south of where they were killed, and at a place where defendant was required to maintain a lawful fence.

2. **———: ———: ———: Burden of Proof.** In an action against a railroad company for double damages for killing stock the plaintiff is required to prove either directly or indirectly from physical facts and circumstances that the animals entered the right of way at a place where the statute requires the fences or cattle-guards to be erected and maintained and that the statute had not been complied with.

3. **———: ———: ———: Place Animals Entered: Presumptions.** In an action against the railroad company for double damages for killing plaintiff's horses on account of failure to fence, the defendant contended that in the absence of evidence to the contrary the inference is that the horses entered the right of way at a point opposite where they were found dead on the railroad track. In this case the fence opposite where

Digitized by Google

the horses were found dead was a lawful fence, but a quarter of a mile south was an open gap in a wing fence, the only place where the horses could have entered the right of way without jumping a lawful fence. *Held*, that the presumption contended for by defendant could not be applied to the facts in this case, but that the reasonable inference from all the facts and circumstances was that the horses entered the right of way through the gap in the wing fence.

Appeal from Butler Circuit Court.—*Hon. J. C. Sheppard*, Judge.

AFFIRMED.

*R. T. Railey* and *N. A. Mozley* for appellant.

(1) There is no proof in the record of where the animals alleged to have been killed entered the right of way, and the law in such case presumes that such entry was made at the point where the animals were found dead. Souders v. Railroad, 127 Mo. App. 123; Acord v. Railroad, 113 Mo. App. 99; Hurd v. Chappel, 91 Mo. App. 317; Ellis v. Railroad, 89 Mo. App. 243; Kinion v. Railroad, 39 Mo. App. 383; Duke v. Railroad, 39 Mo. App. 107. (2) Before respondent made a case which should have been given to the jury, the burden was on him to prove that his horses were killed by one of appellant's trains and that said horses entered the right of way at a point where appellant was required by law to erect and maintain fences and cattle-guards and had failed to do so. Respondent, having failed to make this proof, failed also to make a prima facie case and appellant's peremptory instruction prayed for at the close of the evidence. Ellis v. Railroad, 89 Mo. App. 243; Kinion v. Railroad, 39 Mo. App. 383.

*Abington & Phillips* for respondent.

(1) Plaintiff's testimony made out a prima facie case against the defendant and the court did not com-

Digitized by Google

mit error in refusing the peremptory instruction asked by the defendant at the close of plaintiff's evidence. Jones v. Railroad, 44 Mo. App. 15; Lepp v. Railroad, 87 Mo. 139; Schlotzhauer v. Railroad, 89 Mo. App. 65; Walther v. Railroad, 55 Mo. 271; Briscoe v. Railroad, 25 Mo. App. 468; Goodwin v. Railroad, 53 Mo. App. 9. (2) Plaintiff could establish his case by circumstantial evidence as well as by direct testimony and could establish the fact that his horses entered defendant's right of way at a point that it was required by law to fence. 33 Cyc. 1294, 1306; Jones v. Railroad, 44 Mo. App. 15.

NIXON, P. J.—This is an action under the double damage act for the killing of two of plaintiff's horses. Plaintiff obtained judgment for $700 from which the defendant appealed.

The action was prosecuted under section 3145, Revised Statutes 1909, to recover double damages for the killing of two horses on the fifteenth day of December, 1910, at a point on appellant's railroad between Poplar Bluff and Harviell, Missouri, where it is alleged the defendant was required to maintain lawful fences and had failed to do so. The horses were found dead on the right of way, midway between Poplar Bluff and Harviell. The nature of their injuries was evidence of their having been struck by the cars. A quarter of a mile or more south of where said horses were found, at a crossing over the railroad track, defendant was at the time constructing a side track, and a portion of the wing fence connecting the cattle-guard with the lateral fence had been removed for that purpose and there was an open gap in the fence along the right of way. The place where the horses were found was seven or eight miles from plaintiff's home which was south of said point and three miles east of the railway track. Plaintiff claimed to have bought these horses somewhere in Butler county on the pub-

Digitized by Google

lic road from a man traveling through the state, and that they were therefore strange horses in the community. He stated that he took them to his home and turned them loose on the commons; that they ranged around his place for about a month, and then, according to his idea, undertook to go back to the place where he bought them from the stranger passing through the state. Some adverse comment is made by appellant on plaintiff's testimony as to how much he paid for the horses but that was properly a question for the jury and appellant must abide by their decision.

The evidence offered in this case at the trial tended to show the following state of facts: The town of Harviell and the city of Poplar Bluff are about six or seven miles apart, being the stations on defendant's railroad north and south of where plaintiff's animals were killed. The railroad between these two stations runs north and south. About half way between these stations the railroad is crossed by a public county road that runs east and west. Two miles farther north the railroad is crossed by another public road that runs east and west. Between these two public roads and on each side of the railroad are cultivated fields. This block of defendant's right of way consists of a stretch of land one hundred feet wide and two miles long. The nearest that this block of the defendant's right of way comes to the corporate limits of any city, town or village, is one and one-half miles from the corporate limits of the city of Poplar Bluff.

Under the statute it was the duty of the defendant to erect and maintain cattle-guards and wing fences connecting with its lateral fences along the northern boundary of the public road on the south end of this block of its right of way; it was also its duty to maintain lateral fences between its right of way and the fields on either side up to the north end of this block; it was also the duty of the company to erect and maintain cattle-guards and wing fences

Digitized by Google

connecting with its said lateral fences along the southern boundary of the public road on the north end of this block of its right of way. If the company had performed these duties, it would have fenced a tract of land in Butler county in the shape of a parallelogram two miles long and one hundred feet wide. Now it is conceded that it was the duty of the defendant to erect and maintain lawful fences except where cattle-guards were necessary (and at such places to erect and maintain lawful cattle-guards) on all sides of this parallelogram of land belonging to the defendant. It follows as a matter of course that a horse could not have gotten within the confines of the defendant's right of way, bounded as above described, without entering at a place where it was the duty of the defendant to erect and maintain a lawful lateral fence, a lawful wing fence, or a lawful catttle-guard; and it matters not, as far as the liability of the defendant to fence is concerned, at what point of this parallelogram of defendant's right of way plaintiff's horses entered because they must have entered at some point where the defendant was bound to fence.

Plaintiff's horses were turned out and roved at will over the country, there being no stock law in force in the county, and were next found dead in the parallelogram of right of way above described, something like one-fourth of a mile north of the gap in the wing fence, this opening being the only place they could have entered said right of way without jumping a lawful fence. There was some evidence tending to show that this place where the fence was down was on the shortest route between where the horses were found dead and where they were last seen alive; and that the place where they were found dead was between plaintiff's home and the place where he bought them.



Digitized by Google

The appellant's contention is that a prima facie case was not made and that its peremptory instruction requested at the close of all the testimony should have been given; that plaintiff under the double damage statute is required to prove, either directly, or from physical facts and circumstances, that the animals entered the right of way at a place where the statute requires the fences and cattle-guards to be erected and maintained, and that he had not made such proof. The appellant states as its legal position that there is no proof in the record showing where the animals alleged to have been killed entered upon the right of way and that the law in such case presumes that such entry was made opposite the point where the animals were found dead. In support of this position appellant has cited numerous cases from the appellate courts of this state. The liability of the defendant in this class of cases is statutory and plaintiff can only recover upon proof of the defendant's failure to lawfully fence at the place where the animals killed came upon the right of way as provided in section 3145, Revised Statutes 1909. The burden of making this proof is undoubtedly upon the plaintiff and his action fails unless he makes out a prima facie case. He is required to prove, either directly, or from physical facts and circumstances, that the animals entered the right of way at a place where the statute requires the fences or cattle-guards to be erected and maintained and that the statute had not been complied with. As stated, this need not be by direct testimony; proper circumstantial evidence of sufficient probative force will support the burden of proof; but the same must show that the animals entered at a place on the right of way where the defendant was required to erect and maintain a lawful fence or cattle-guards and had failed to do so. The evidence in this case is substantially harmonious, there being no serious conflict or dispute. The only question is

Digitized by Google

whether the plaintiff's evidence, fairly considered, and by reasonable deductions therefrom, is sufficient to show the place where the animals entered upon the defendant's right of way.

The question of the sufficiency of the evidence in a case under circumstances somewhat similar to the present case was presented to the Supreme Court of Iowa in Rhines v. Railway Co., 39 N. W. 912. In that case there was a break in defendant's fence where the company was required to maintain a lawful fence. Close by was a street crossing in which they were not required to maintain a lawful fence. The question arose as to the sufficiency of the evidence, and the court held that when there is no evidence as to whether the horses went on the track through a break in the defendant's fence, or at a street crossing, except that the last point to which they were traced was nearer the break in the fence, a finding that the horses went through the break, thus entitling plaintiff to double damages, is not supported by the evidence.

So in this case, if the facts and circumstances had failed to show that the animals killed entered the right of way at a place where the company was required to fence or at a place where it was not required to fence so that the question was left an open one whether it was probable that they entered at the one place or the other, in such an event, the plaintiff would have failed in his action, not having established a prima facie case under the conclusions reached by the Iowa court. But that is not this case. Here the plaintiff's horses could not have entered the right of way of the defendant and been killed where they were killed without having entered the right of way at a place where if the defendant had obeyed the statute they would have been repulsed by a lawful fence, either lateral or wing, or lawful cattle-guards.

The evidence in this case tended to show that the plaintiff's horses were traced traveling along defend-

Digitized by Google

ant's right of way in a northerly direction toward the place where they were purchased by the plaintiff, and that the place where the gap was open into the right of way was on the shortest route between where they were found and where they were last seen alive. The circumstances further tended to show that if the horses got on the right of way opposite the place where they were found dead, they must have passed the open gap which was between thirty and forty feet wide where other animals had entered upon the right of way, and have gone beyond that gap a quarter of a mile and then have jumped over a lawful fence to get on the right of way instead of having entered the open gap and then continued traveling northward in the direction they were already going to the point where they were found dead.

Appellant strenuously contends that the evidence is not sufficient to support the judgment in this case and invokes the presumption that in the absence of evidence to the contrary the inference is that the animals entered upon the right of way at a point opposite where they were found dead on the railroad track. This presumption or inference of fact in this class of cases was first authoritatively declared by our Supreme Court in the case of Jantzen v. Railway Co., 83 Mo. 171. That was an action for double damages for the killing of plaintiff's cow by the defendant company. The evidence tended to show that a point along the defendant's right of way opposite where the cow was found dead should have been fenced under the requirements of the law but was not fenced as required. There was no other evidence as to where the cow got on the track, and the appellant in that case as in this insisted that there was a complete failure of proof as it was not shown by the evidence where the animal got upon the defendant's track and that such a showing to make a prima facie for the plaintiff was indispensible to a recovery. The court in its

Digitized by Google

opinion said: "There is no express statement in the testimony that the cow entered upon the track where she was killed. But the facts appear in evidence that her hair and blood and carcass were found on the track at a point which was not, but should have been, fenced. In the absence of evidence to the contrary the natural inference is that she entered upon the track at that point, not that she entered upon the track at a highway crossing and jumped over fences and cattle-guards to get there." This is the origin of the presumption sought to be applied in this case and expresses the whole extent of its operation. Under the evidence in this case the plaintiff's horses in order to have reached the point where they were killed—under the uncontradicted evidence—must have entered the right of way of the defendant through the gap that was not fenced, a quarter of a mile from where they were found dead, at a point where the defendant was required to fence, or they must have jumped over lawful fences or cattle-guards to get upon the right of way, as the whole parallelogram in which they were found dead, except the open gap, was surrounded with lawful fences and cattle-guards. As said in the Jantzen case, supra, "Manifestly they could do this only by committing a trespass, a thing to be proved and not presumed." As the animals killed were horses—not mules—and as it was not shown that they were breachy, we know of no rule of law that requires us to presume that these particular animals had such propensities as to induce them to go a quarter of a mile beyond an open gap in order to get an opportunity to jump over a lawful fence to get upon the defendant's right of way. We are of the opinion that the evidence in this case was sufficient to establish a prima facie case for the plaintiff. The judgment is accordingly affirmed. All concur.

Digitized by Google

# HUGHES & THURMAN, Appellants, v. JOHN M. DODD, Respondent.

**Springfield Court of Appeals, April 1, 1912. Motion for Rehearing Overruled May 8, 1912.**

1. **REAL ESTATE BROKERS: Commissions: Contracts: Conditions.** In an action for a real estate agent's commission, it is *held* that under the conditions of the contract the plaintiffs were to procure a purchaser for defendant's property at the sum of $5500 or more, and that unless they procured a purchaser who was willing to pay such sum, they were not to receive any compensation for their services. It appeared in evidence that plaintiffs tried to sell the property to one N for $5500, but were unable to do so; that later the defendant, without having interfered with plaintiffs' deal, sold the property to N for $4150. *Held*, that plaintiffs were not entitled to recover the commission on this sale.

2. ———: ———: ———: ———: **Burden of Proof.** Plaintiffs sued upon a contract, alleging that defendant placed the property in question in their hands for sale, agreeing to give them the usual commission allowed real estate brokers for their services for making the sale and alleging performance thereof. *Held*, that before plaintiffs can recover they must prove the contract pleaded and a compliance on their part with the terms thereof, and unless they do there can be no recovery.

3. ———: ———: **Owner Selling at Less Price.** Where real estate is listed with a broker to sell at a certain price with an agreement that the broker shall have a commission for making a sale and the broker brings about the negotiations between the two, which results in a sale, the broker is entitled to his commission, even though the seller changes his price from that given the broker and accepts a smaller amount.

4. ———: ———: ———. When a broker for an agreed commission is employed to sell certain real estate at a fixed price, but does not procure a purchaser at that price and the owner sells it at a less price, the broker is not entitled to receive a commission, though it appears that the purchaser to whom the sale was made had negotiated with the broker. The commission is not earned until the broker sells to a purchaser at a fixed price.

5. **CONTRACTS: Conditions.** When a contract is made upon a certain named condition, a party seeking to recover under such contract must bring himself within such condition.

Digitized by Google

Appeal from Greene Circuit Court.—*Hon. James T. Neville,* Judge.

AFFIRMED.

*F. T. Stockard* and *Hamlin & Seawell* for appellants.

(1) Appellants procured the purchaser and brought about the sale. Therefore they are entitled to the regular commission on the amount paid, to-wit, $4150; Nichols v. Whiteacre, 112 Mo. App. 692; Gwinup v. Sibert, 106 Mo. App. 709. (2) If the seller reduces the price from that given the broker, and accepts a smaller sum, he is liable to the broker for his regular commission on the amount of the proceeds actually realized. Glade v. Mining Co., 129 Mo. App. 443; Grether v. McCormick, 79 Mo. App. 325; Hobey & Brown v. Aaron, 122 Mo. App. 582.

*Patterson & Patterson* for respondent.

(1) Plaintiff sues upon an express contract, alleging that defendant placed the property in question in their hands for sale agreeing to give them the usual commission allowed real estate brokers for their services for making the sale and alleging performance thereof. Before plaintiff can recover he must prove the contract pleaded and a compliance of the terms thereof, and unless he does there can be no recovery. Cole v. Armour, 154 Mo. 351; Lumber Co. v. Snyder, 65 Mo. App. 468; Eyerman v. Association, 61 Mo. 489; Huston v. Tyler, 140 Mo. 252; Clements v. Yates, 69 Mo. 625; Furth v. Anderson, 37 Mo. 354. (2) Where the contract of agency fixes a net amount for the owner without a commission, the broker is not entitled to compensation, except such sum as is realized over and above the net sum named by the owner. La Force v. University, 106 Mo. App. 517; Blackwell v. Adams, 28 Mo. App. 61.

Digitized by Google

NIXON, P. J.—This is an action by plaintiffs as real estate brokers for their commission for the sale of defendant's property. Defendants obtained judgment and plaintiffs appealed.

Appellants alleged in their petition "that on or about November, 1910, the defendant employed the plaintiffs to sell his livery barn for him and agreed to allow them for their services the usual commission; that in pursuance of said employment they procured a purchaser for said barn and that the defendant sold the same to said purchaser and conveyed it by sufficient warranty deed and received from said purchaser the sum of five thousand dollars; that the usual commission allowed real estate agents for sales of this kind is five per cent on the first thousand and two and one-half per cent on the remainder." The answer was a general denial.

The evidence on behalf of plaintiffs showed that they were engaged in the real estate business in the town of Republic and that defendant had formerly been engaged in the livery business in said town; that sometime during the month of November, 1910, defendant placed his livery barn and the lot upon which it stood in plaintiffs' hands for sale under a special contract in regard to the commission which plaintiffs were to have for their services in making a sale. Such contract on behalf of plaintiffs' firm was made by S. M. Hughes with the defendant. The testimony of S. M. Hughes pertinent to the matter of commission was that defendant said to him, "Sammy, I will give you a good show, and if you sell it for $5500 I will give you a commission on $5500, and I will give you all over that." On cross-examination Hughes testified: "He told me he would give me all over $5500 and would pay a commission upon $5500 if I got that much." The plaintiffs accepted this proposition, and, to use the words of Hughes, "Started out to scare up a deal." The evidence on behalf of the plaintiffs also

Digitized by Google

tended to show that within a short time after the contract was made with Dodd the plaintiffs tried to sell the property to Tom Nelson for $5500, but that Nelson refused to buy the property at that price and the deal fell through and negotiations were dropped.

Plaintiffs did not contend that they had anything to do with the final sale of defendant's property to Nelson, which was consummated on the twenty-fifth day of January, 1911, by defendant, by which the barn and lot brought the sum of $4150.

The defendant denied that he made the contract testified to by Hughes, but admitted that he had placed the property in Hughes' hands to trade for a farm, or to sell for $6000, and agreed to pay him a commission if he could sell the barn for $6000 and that he agreed to give Hughes all over that amount. Defendant further testified that prior to the time he sold the property in question he had taken the same out of plaintiffs' hands with their consent. He was corroborated in this by one A. C. Miller.

Tom Nelson, the purchaser of the property, testified that he knew that defendant's livery barn was for sale about three weeks before either of the plaintiffs said anything to him; that negotiations between plaintiffs and himself for the purchase of said property had fallen through long before he bought the property from the defendant; that he refused to give the amount plaintiffs were asking and that he never would have given that sum; that his brother and Lum Miller were the ones that got him and Dodd together; that the terms of the sale were finally agreed upon the twenty-fifth of January, 1911, and that the price paid was $4150. It is seen that this evidence tended to show that long before the deal was finally consummated between Nelson and defendant, plaintiffs had failed to bring Nelson and defendant together on the terms of the special contract of sale under which plaintiffs were acting.

Digitized by Google

At the close of all the evidence the court gave a peremptory instruction requiring the jury to find the issues in favor of the defendant. The propriety of giving this instruction is challenged by the appellants. The only question brought to our consideration is the sufficiency of plaintiff's evidence to sustain the cause of action stated in their petition.

Plaintiffs sued upon a contract, alleging that defendant placed the property in question in their hands for sale agreeing to give them the usual commission allowed real estate brokers for their services for making the sale, and alleging performance thereof. Before plaintiffs can recover they must prove the contract pleaded and a compliance on their part with the terms thereof, and unless they do there can be no recovery. [Wilbur Stock Food Co. v. Bridges, 160 Mo. App. 122, 141 S. W. 714.]

In the case of LaForce v. Washington Univ., 106 Mo. App. 517, 81 S. W. 209, a case similar to the one at bar, Judge Ellison said: "There is no doubt that plaintiff made a faithful and diligent effort to sell the defendant's property and that in denying him any relief his effort must go without remuneration. But that results from the nature of the contract, the terms of which . . . were such, that if he had succeeded in his expectations, he would have made a large sum of money; and if he failed, his labor was to be without reward."

The law is well settled that where real estate is listed with a broker to sell at a certain price with an agreement that the broker shall have a commission for making a sale, and the broker brings about negotiations between the two, which results in a sale, the broker is entitled to his commission even though the seller changes his price from that given the broker and accepts a smaller amount. In such case the law will not allow the owner of the property sold to reap the fruits of plaintiff's labor and then deny him his

Digitized by Google

just reward. [Hovey & Brown v. Aaron, 133 Mo. App. l. c. 582, 113 S. W. 718.]

But such cases do not apply when the contract for commission is a conditional or contingent one. The learned trial judge in this case rightly construed the plaintiffs' contract for commission as shown by plaintiffs' evidence to be a conditional one, the condition being that they should procure a purchaser for defendant's property at the sum of $5500 or more and that unless they procured a purchaser who was willing to pay such sum they were not to receive any compensation for their services. It is elementary law that when a contract is made upon a certain named condition, a party seeking to recover under such contract must bring himself within such condition. This rule of law applies to a broker's contracts as well as to others.

If plaintiffs' evidence had sustained their interpretation of the contract—that defendant agreed to pay them the regular commission *up to $5500* and in addition thereto allow them all above that sum they could get—we would have under consideration an entirely different contract from that presented by the record. The evidence for the plaintiffs does not tend to prove such a contract but does tend to prove a conditional one. If a broker sees fit to make his commissions depend upon his knowledge of the value of the property to be sold and upon his skill and ability as a salesman to sell at a named price, he must stand or fall by the contract he has made.

In none of the cases cited by the appellants as authority in support of their contention do we find a contract for the broker's commission, either expressly or by fair implication, providing that commission was not to be paid unless the property was sold at a named price and in which the seller refused to consummate the sale because not made by the agent at such designated price. They were cases where the owner of the

Digitized by Google

property authorized the sale at a designated price but did not make the payment of the agent's commission depend upon a sale at such stipulated price.

Plaintiffs admitted that they were unable to secure a purchaser who would pay $5500. The evidence was conclusive that the property in question sold for $4150. The defendant had a perfect right under the law to protect himself from having to pay a commission unless his property sold for a certain sum and if the plaintiffs did not wish to list the property on the terms offered they should have rejected the defendant's proposition. And while it may be said in this case that under this view of the law the appellants' efforts must go without reward, yet it is the contract that they made and they took the chance of being able to make a large sum out of the deal or losing all remuneration for their services. Courts cannot make contracts for individuals. When a broker for an agreed commission is employed to sell certain real estate at a fixed price but does not procure a purchaser at that price and the owner sells it at a less price, the broker is not entitled to recover a commission even though it appear that the purchaser to whom the sale was made was procured by him. The commission is not earned until the broker sells to a purchaser at the fixed price. [Parker v. National Mut. B. & L. A. (W. Va.), 46 S. E. 811; Noyes v. Caperton (W. Va.), 69 S. E. 364; Blackwell v. Adams, 28 Mo. App. 61.]

This case presents no evidence that defendant improperly interfered with the making of a sale by plaintiffs at the price stipulated nor that he prevented the strict performance of the contract. The plaintiffs not having procured a purchaser at the fixed price, defendant sold the property at a less price.

The service which plaintiffs were employed to render was never performed and they have no claim to recover under the express contract proved. No error was committed by the trial court in giving the

Digitized by Google

peremptory instruction requiring the jury to find the issues in favor of the respondent.

The testimony admitted over plaintiffs' objections was immaterial and did not prejudice the plaintiffs to any appreciable degree and the action of the court in admitting it is not reversible error.

It follows from what has been said that the judgment should be affirmed and it is so ordered. All concur.

---

## S. M. STEVENS, Respondent, v. A. J. EARLL, Appellant.

**Springfield Court of Appeals, May 6, 1912.**

1. **JUSTICES' COURTS: Attachments: Change of Venue.** When plaintiff sues on an action before a justice of the peace and in aid of his action procures an attachment and such attachment is resisted by a plea in abatement and the issues presented by such plea are tried by a jury, and the cause then set for trial on the merits at a subsequent date, the plaintiff is entitled to a change of venue from such justice upon filing an affidavit setting up a reason authorized by the statute, provided the same is filed before a jury is sworn to try the cause on the merits.

2. **CHANGE OF VENUE: Statutory Right: Practice.** The right to a change of venue only exists by virtue of some statute authorizing it.

3. **ATTACHMENT: Judgment on Plea in Abatement.** An attachment in aid of a civil suit is a mere provisional remedy and an ancillary incident in the cause and the judgment on the issue in abatement is no more than an interlocutory judgment.

4. **JUSTICES' COURTS: Attachment: Change of Venue: Appeal.** An appeal by defendant from a judgment against him on the merits rendered by the justice having jurisdiction of the cause on a change of venue, taken after a judgment has been rendered on the plea in abatement, would carry the whole case to the circuit court for retrial.

5. ———: ———. The law governing attachments in courts of record applies to judgments before a justice of the peace.

Digitized by Google

Appeal from Jasper Circuit Court.—*Hon. David E. Blair,* Judge.

AFFIRMED.

*Clay & Davis* for appellant.

(1) Section 7481, Revised Statutes 1909, provides: "Either party shall be entitled to a change of venue in any civil cause pending before a justice of the peace, if he shall, before the jury is sworn, or the trial is commenced before the justice, file an affidavit," etc. The cause pending referred to in the section above quoted does not mean the cause of action sued upon, but refers to and means the case pending, the action pending, the suit pending. (2) Cause pending is not synonymous with cause of action, but cause and case are used as synonymous in statutes and judicial decisions, each meaning a proceeding in court, a suit, an action. 2 Words and Phrases, p. 1013. (3) The investigation of the truth of the grounds alleged in the affidavit for attachment was a trial. 8 Words and Phrases, p. 7095; R. S. 1909, sec. 1967; Breed v. Hobart, 187 Mo. 140. (4) Section 2335, Revised Statutes 1909, provides that plaintiff in an attachment suit may appeal from either the judgment on the plea in abatement and on the merits as the case may be or both, but that the defendant must appeal from the whole case, if he appeals at all. It has been held that this section governs appeals from justices of the peace in attachment suits. Stephenson v. Jones, 84 Mo. App. 249; Newman v. York, 74 Mo. App. 292. (5) If the change had been granted, and if the defendant had lost the suit upon the merits in the court to which the cause was transferred how could his appeal from the merits bring up the judgment on the plea in abatement from the court of Justice Earl? (6) The case of Gibson v. Sidney, 69 N. W. (Neb.) 314, is an authority in sup-

Digitized by Google

port of the proposition that a trial of a plea in abatement is a trial within the meaning of our change of venue statute.

*John B. Cole* and *John J. Wolfe* for respondent.

(1) The plaintiff in the case before Justice Earll, plaintiff's action being a civil action, was entitled to have an attachment therein. R. S. 1909, sec. 2294. (2) The law gave the defendants in said case of Stevens v. Mahmood, the right to file a plea in the nature of a plea in abatement and to have trial of the issue raised thereby. R. S. 1909, sec. 7644, 7645. (3) After the attachment of Mr. Stevens against the Mahmoods had been sustained, there remained to him "a civil cause pending before a justice of the peace," and he had a legal right to a change of venue upon application before a jury was sworn to try that cause, on the trial commenced before the justice, sitting as a jury. R. S. 1909, sec. 7481. (4) Does the civil cause referred to in section 7481, Revised Statutes 1909, mean the cause of action sued on? We submit that such is plainly the sense conveyed by the language used. (5) Attachment in a civil action is merely an ancillary proceeding in civil cause of action or suit pending. 5 Amer. Digest, p. 198; Frank v. Siegel, 9 Mo. App. 468; Curtis v. Moore, 3 Minn. 29; R. S. 1909, sec. 2294. (6) The process of attachment is merely auxiliary and is intended in certain cases to seize the property of a defendant and hold it to abide the suit. 1 Withrow & Stiles, Iowa Digest, 88.

NIXON, P. J.—Respondent brought an action against Tofeck Mahmood and Ollie Mahmood in the court of A. J. Earll, the appellant herein, a justice of the peace in Jasper county, upon an account for merchandise alleged to have been sold and delivered but never paid for. In aid of his suit, respondent had

Digitized by Google

an attachment as the statute provides (section 2294, Revised Statutes 1909). The Mahmoods filed a plea in abatement of the attachment (under section 7644, Revised Statutes 1909), and on the issues thus raised requested and had a jury which on the trial returned a verdict finding for the plaintiff, Stevens, thereby sustaining the attachment. That jury was thereupon discharged. Some days afterward the case came on for trial on the merits. Defendants requested a jury and a venire was issued for one. The plaintiff, Stevens, appeared and before the jury was impaneled and sworn filed an affidavit for a change of venue alleging that plaintiff could not have a fair trial of said cause in said court on account of the bias and prejudice of the justice, A. J. Earll, against plaintiff, and that said ground was discovered by plaintiff since the convening of court that morning. The affidavit was not opposed by any objection as to form or substance, but the Mahmoods did object to the change of venue claiming that Stevens having tried the issue raised by plea in abatement in the attachment proceedings before Justice Earll had no right to a change of venue from Justice Earll on the trial as to the merits of the cause, but must submit to trial in Earll's court. The justice adopted the view that as the attachment issue was tried before him, the issues upon the merits, therefore, must be tried before him, overruled the application for change of venue, and ordered the trial to proceed. Thereupon the plaintiff, Stevens, applied to the circuit court of Jasper county for a writ of mandamus commanding said justice to grant such change of venue, or to show cause why he should not do so, and the alternative writ was granted. Justice Earll appeared in the circuit court and moved to quash the writ "for the reason that no fact or facts are stated in said writ entitling plaintiff to the relief therein sought." The circuit court overruled said motion to quash the alternative writ. Thereupon the

Digitized by Google

court heard the facts and made a finding of facts (which finding appellant does not preserve and present in his record) and thereupon rendered judgment to the effect that the court's order to said Justice Earll to grant the change of venue as prayed be made permanent. Thereafter the appellant moved to set aside the circuit court's judgment and to grant him a new trial, assigning two grounds, as follows: "(1) The court erred in overruling appellant's motion to quash. (2) The judgment of the court is against the law." The circuit court overruled said motion and in the usual way an appeal was applied for and granted to this court.

The question for our consideration may be thus stated: When plaintiff sues on an account before a justice of the peace and in aid of his action procures an attachment and such attachment is resisted by a plea in abatement, and the issues presented by such plea are tried to a jury, and the cause set for trial on the merits at a subsequent date, is the plaintiff entitled to a change of venue from such justice, upon filing an affidavit setting up a reason authorized by the statute, before a jury is sworn to try the cause?

The right to a change of venue only exists by virtue of some statute authorizing it. The controversy in this case is over the construction to be given the language used in section 7481, Revised Statutes 1909, and the general law relating to change of venue in civil actions.

Section 7481 is, in part, as follows: "Either party shall be entitled to a change of venue in any civil cause pending before a justice of the peace, if he shall, before the jury is sworn, or the trial is commenced before the justice, file an affidavit . . . that he cannot have a fair and impartial trial before such justice on account of his bias or prejudice, . . . which



Digitized by Google

affidavit may be made either by a party to a suit pending or by said party's agent or attorney."

Appellant contends that the "civil cause pending," referred to in this section, does not mean "the cause of action sued on."

Section 7644, Revised Statutes 1909, provides: "In all cases where property or effects shall be attached, the defendant may put in issue, by a verbal plea in the nature of a plea in abatement, on oath, the substance of which shall be noted by the justice on his docket, the existence of the facts alleged in the affidavit on which the attachment was sued out."

Section 7645, Revised Statutes 1900, is as follows: "Upon such issue the plaintiff shall be held to prove the existence of the facts alleged by him as the ground of the attachment, and if the issue be found for him, the cause shall proceed; but if it be found for the defendant, the attachment shall abate at the cost of the plaintiff, and he and his securities shall be liable on their bond for all damages occasioned by the attachment or other proceedings in the case; but the suit shall proceed to final judgment on the merits of the cause of action sued on." It is clear that this section does distinguish the issue in the attachment proceedings from the issues "on the merits of the cause of action sued on." The first "issue" referred to in this section is plainly an issue arising subsequent to the existence of the "cause of action sued on," and such issue arises out of the facts alleged in the affidavit, as the ground of the attachment—facts required to be proved by the plaintiff upon *such issue* joined by reason of the "verbal plea in the nature of a plea in abatement, on oath" provided for in section 7644. Such facts alleged in the affidavit, possibly did not exist when the suit was filed and therefore could be no part of the cause of action sued on. *Such issue,* therefore, arising out of such facts to be so tried (before the cause or suit shall proceed) necessarily is not an

Digitized by Google

issue *in the cause of action sued on.* "Such issue" to be "found" was not intended to be found by "the jury" mentioned in section 7481. And expressly, by the terms of section 7645, the determination of "such issue" cannot affect the issues in "the cause of action sued on." We think it is clearly understood that an attachment in aid of a civil suit is a mere provisional remedy—an ancillary incident allowed in the cause. To file a civil action is one thing, and to have defendant's property seized and held by the proper officer pending the litigation thus insuring satisfaction or part satisfaction of whatever judgment may be obtained is quite another thing. "The writ of attachment is not a form of action. It is not a suit either at law or in equity. It is a mere aid by which the defendant or his property, or both, may be brought into court to abide the result of the litigation." [Frank v. Siegel, 9 Mo. App. l. c. 468.] The auxiliary proceeding of attachment may be defective without affecting the principal case, by express provision of section 7645, Revised Statutes 1909. It is our opinion that "the jury" referred to in section 7481 is the jury sworn to try the "civil cause" and not the auxiliary proceeding which may arise or may not arise in the "civil cause." The judgment on the issue in abatement is no more than an interlocutory judgment. [Duncan v. Forgey, 25 Mo. App. 310.] In 24 Cyc. 508, in the article on justices of the peace, it is said that "An application for a change of venue should be made before the commencement of the trial." In Minnesota it is held that neither a settlement of the pleadings nor the argument of a motion to dissolve an attachment is a commencement of the trial, and that an application for a change of venue before the commencement of the trial on the merits is in time. [Curtis v. Moore, 3 Minn. 29.]

Section 7654, Revised Statutes 1909, provides that the provisions of law governing attachments in courts

Digitized by Google

of record shall apply to attachments before justices of the peace, so far as the same may not be inconsistent with the provisions which are specially applicable to the latter. Section 2335, Revised Statutes 1909, provides that plaintiff in an attachment suit may appeal from either the judgment on the plea in abatement and on the merits as the case may be or both, but that defendant must appeal from the whole case if he appeals at all. Appellant asks how—if the change of venue had been granted and the defendants had lost on the merits in the court to which the cause was transferred—defendants could have appealed and brought up the judgment on the plea in abatement from the court of Justice Earll. Section 7482, Revised Statutes 1909, provides that upon the filing of the affidavit in due time, the justice must allow the change of venue and note the fact in his docket, and that he shall immediately transfer all the original papers and a transcript of all his docket entries in the case to some convenient justice, etc. Section 7483, Revised Statutes 1909, provides that the justice to whom the cause is sent, shall, when he becomes possessed of the cause, forthwith proceed with the same in like manner as if it had been originally commenced before him, etc. An appeal by defendant from a judgment against him on the merits by the justice having jurisdiction of the cause by change of venue would carry the whole case, the plea in abatement as well as issues on the merits to the circuit court for retrial. This holding makes the law governing attachments in courts of record apply to judgments before justices of the peace. A careful examination of the different sections of the statutes referred to convinces us that the judgment of the circuit court was for the right party and should be affirmed. It is so ordered. All concur.

Digitized by Google

# STATE OF MISSOURI, Respondent, v. HUFFNAGLE SEBASTIAN, Appellant.

**Springfield Court of Appeals, May 6, 1912.**

1. **CRIMINAL LAW: Selling Liquor to Minor: Indictment: Surplusage: Allegations.** An indictment charged that the defendant "then and there being a wine grower" unlawfully sold intoxicating wine to a minor, "said wine being of his own production." There was a total failure of proof as to the allegation that defendant was a wine grower and that the wine was of his own production. *Held*, that by omitting the clauses that defendant was a wine grower and the wine was of his own production, the indictment was broad enough to charge an offense under section 4733, Revised Statutes 1909, making it a misdemeanor to sell liquor to a minor without the written permission of the parents.

2. **———: Indictment: Failure of Proof: Conviction Under Another Section.** Where one is indicted under one section of a statute and the evidence shows he is not guilty of the violation of that section but is guilty of the violation of another section, he may be convicted of a violation under the section which the evidence shows him guilty, provided, the indictment is broad enough to include the offense within its allegations.

Appeal from Greene Circuit Court.—*Hon. John T. Moore,* Special Judge.

AFFIRMED.

*T. J. Delaney* and *Patterson & Patterson* for appellant.

(1) The indictment is based upon section 7221, Revised Statutes 1909. The defendant is charged as a winegrower and a failure to prove him to be such is a fatal conviction. State v. Gary, 124 Mo. App. 175; State v. Douglas, 48 Mo. App. 39; State v. Kurtz, 64 Mo. App. 123; State v. Green, 26 Mo. App. 626; State v. Barnett, 111 Mo. App. 692. The case of State v. Gary, 124 Mo. App. 175, is on "all fours" with the

Digitized by Google

case at bar and the court cannot affirm the judgment of the trial court without disregarding the law as declared in State v. Gary, and the other cases cited above.

*J. H. Mason,* prosecuting attorney, for respondent.

(1) In the case of State v. Grey, 124 Mo. App. 175, cited by appellant and relied on by appellant, the record does not disclose that the information on which the appellant was tried was broad enough to sustain a conviction for selling liquor to a minor under terms of section 4733, Revised Statutes 1909. (2) In the trial of the case at bar the trial court followed the doctrine laid down by the St. Louis Court of Appeals in State v. Quinn, 94 Mo. App. 66. (3) The doctrine is reaffirmed by the Kansas City Court of Appeals in case of State v. Hammel, 127 Mo. App. 661, where Judge JOHNSON, speaking for the court refers to and quotes the language of the court in the case of State v. Quinn. We find the same doctrine adhered to in the case of State v. Gallagher, 126 Mo. App. 729.

NIXON, P. J.—Appellant was tried and convicted on an indictment charging that defendant on the —— day of October, 1910, at the county of Greene and state of Missouri, "then and there being a winegrower, did then and there unlawfully, directly and indirectly sell, give away, furnish and deliver and otherwise dispose of certain intoxicating wine, to-wit: To one Dutch Mumford, a minor, then and there on the premises of the said Huffnagle Sebastian, and the said wine being his own production, of the said Huffnagle Sebastian, without the written permission of the parent, master or guardian of the said Dutch Mumford, first had and obtained for such purpose, and without any other lawful authority to do so, contrary to the form of the statute," etc.

The jury found him guilty and assessed his punishment at a fine of forty dollars.

Digitized by Google

It is claimed by appellant that the indictment was drawn with the intention of charging the defendant with a violation of section 7221, Revised Statutes 1909. It is conceded that there was a total failure of proof as to the allegations of the indictment that accused was a winegrower, and that the wine was of his own production. Dutch Mumford, being sworn as a witness for the state testified that at the time of the trial he was eighteen years of age; that on the —— day of October, 1910, he went to defendant's home four miles southeast of Springfield and bought of defendant one pint of wine, paying defendant thirty-five cents for it, which he found to be intoxicating from drinking it. Jerry Mumford, father of the boy, testified as a witness for the state that the boy was eighteen years of age at the time of the trial; that he did not give the accused permission, written or otherwise, to sell or give this boy wine or any intoxicating liquor. The accused at the close of the state's evidence in chief requested and the court refused to give a peremptory instruction to the jury to find the defendant not guilty. Defendant's evidence consisted solely of his own statement that he had not at any time sold wine to Dutch Mumford.

Besides the stock instructions customarily given in criminal cases of this character, the court instructed the jury as follows:

"1. If you find from the evidence that Huffnagle Sebastian in the county of Greene and state of Missouri at any time from September 1, 1910, to December 1, 1910, did sell intoxicating liquor to one Dutch Mumford, to-wit, wine in any quantity, and that said wine was then and there intoxicating, and that the said Dutch Mumford was at the time a minor under the age of twenty-one years, and that such wine was so sold by defendant to the said Dutch Mumford without the written permission of the parent, master or guardian of the said Dutch Mumford, first had and

Digitized by Google

obtained by the defendant, then you will find the defendant guilty and assess his punishment at a fine of not less than forty dollars nor more than two hundred dollars."

"2. Gentlemen of the jury, if a person sells intoxicating liquor to a minor without the written permission of the parent, master or guardian he does so at his own peril and it does not make any difference what representation the minor makes to obtain the intoxicating liquor or what the defendant may have believed as to the age of such minor."

The defendant requested and the court refused to give an instruction which required the jury to find before they could convict the defendant that the defendant at the time of such sale was a winegrower and that the wine sold to said minor was of his own manufacture and production from grapes exclusively of his own growing.

It will thus be seen that the state's attorney and the trial court proceeded on the theory that upon this indictment the accused might be convicted under section 4733, Revised Statutes 1909, which is as follows: "Any person who shall, directly or indirectly, sell, give away or otherwise dispose of or furnish or deliver any intoxicating liquor in any quantity to any minor without the written permission of the parent, master or guardian of such minor first had and obtained, shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not less than forty dollars nor more than two hundred dollars." The appellant contends that the action of the court in proceeding under this section was prejudicial error and this is the only question presented for our determination.

By reading the indictment in connection with section 4733, Revised Statutes 1909, omitting from the indictment the clause, "then and there being a winegrower," and the clause, "and said wine being his

Digitized by Google

own production," it will be found that the indictment follows almost word for word the language of that section of the statutes and it is broad enough to charge an offense under that section, omitting said clauses as surplusage.

In the case of State v. Quinn, 94 Mo. App. l. c. 66, 67 S. W. 974, it is said: "It is a general rule of procedure that if one is indicted under one section of a statute and the evidence shows that he is not guilty of a violation of that section but is guilty of the violation of another section, he may be convicted of a violation under the section of which the evidence shows him guilty, provided the indictment is broad enough to include the offense within its allegation." This case was certified to the Supreme Court and was sustained (170 Mo. 176, 70 S. W. 1117).

We have not failed to give due consideration to the case of State v. Gary, 124 Mo. App. 175, 101 S. W. 614, decided by the St. Louis Court of Appeals. The report of the Gary case shows that the accused was charged with having, as a winegrower, sold wine on his premises to a minor, contrary to section 7221, Revised Statutes 1909, and that he was tried and convicted on the charge that he was guilty as a winegrower with having violated the statute concerning winegrowers. Under the information in that case the accused was not charged with having sold intoxicating liquors to a minor. As defendant Gary was tried and convicted on the theory that he had violated the section as to winegrowers, the St. Louis Court of Appeals properly held that the state was required to prove he was a winegrower. In the present case, however, the defendant was charged with having sold intoxicating wine to a minor, and he was tried and the jury were instructed on that theory. Hence the opinion in the Cary case, upon which the appellant strongly relies, sheds no light whatever on the question presented by this record.

Digitized by Google

A careful comparison of the language of section 4733, Revised Statutes 1909, with that of the indictment suggests reasons for believing that it comes under said section. Section 7221, Revised Statutes 1909, is incorporated in the chapter concerning intoxicating liquors and in article 1 concerning dramshops. In effect, it enacts that the provisions of the article shall not be construed to affect the right of winegrowers to sell wine of their own production in any quantities on their own premises, but further provides that the section should not be construed as giving any winegrower the right on his own premises to sell any wine to any minor. It will be seen that the indictment does not clearly follow the language of the section in that it charges that defendant sold "intoxicating wine," an allegation not required by section 7221, but required by section 4733; also that it charges in the language of section 4733 that the sale was "without the written permission of the parent, master or guardian of the said Dutch Mumford," an allegation not required by section 7221. Thus the indictment contains all the elements and descriptive words necessary to bring the offense charged within section 4733; and it does not appear that the variance was material to the merits of the case or prejudicial to the defendant. Section 7221 provides that a person convicted of a violation thereof shall be punished by a fine of not less than forty nor more than two hundred dollars or by imprisonment in the county jail during a term not to exceed three months, and in addition thereto, shall be liable as provided for in section 7213. Section 4733 provides that a person convicted of a violation thereof shall be fined not less than forty dollars nor more than two hundred dollars. No difference prejudicial to the accused occurs in the penal ties. We find no errors in the record materially af fecting the merits of the controversy. The judgment is affirmed. All concur.

Digitized by Google

# T. W. SHARP, Respondent, v. THE NIAGARA FIRE INSURANCE COMPANY, Appellant.

**Springfield Court of Appeals, May 6, 1912.**

1. **FIRE INSURANCE: Personal Property: Depreciation in Value: Burden of Proof.** In an action on a fire insurance policy it appeared that the trial court tried the case on the theory that the property insured was real estate and declared by instructions given that it devolved upon defendant to show a depreciation in the value of the property if, any, at the time of the loss. This was *held* error for the reason that under the evidence it appeared that the property insured was personal property and in such case it devolved upon the plaintiff to show the actual cash value of the property insured at the time of the fire; and his consequent loss by reason of its destruction.

2. **———: Arbitration: Failure of Appraisers to Agree: Action on Policy.** In an action on a fire insurance policy a provision of the policy required that in the event of disagreement as to the amount of loss, the same should be ascertained by two appraisers, the insured and the company each selecting one and the two so chosen to select an umpire; but it appeared that the two appraisers after being selected were unable to agree upon an umpire and the evidence supported the conclusion of the trial court that such failure to agree upon an umpire was not due to the misconduct of plaintiff or his appraiser. *Held*, that the commencement of this suit after the abandonment of the effort to arbitrate the loss was not premature.

3. **PLEADING: Practice: Failure to File Reply.** The law is well settled in this state that after trial and verdict, without any objection that a reply had not been filed and when the trial has been conducted as though a reply had been filed, no advantage can be taken of such omission and the failure to reply will be considered waived.

4. **REAL ESTATE: Fixtures.** It is an elementary principle of the common law that land includes houses and buildings thereon and that whatever is affixed to the soil is thereby made a part of it and passes by grant of the land without other designation.

5. **———: ———: Trade Fixtures: Landlord and Tenant: Personal Property.** As between landlord and tenant annexations made by the tenant to the real estate in aid of his trade are on the grounds of public policy removable by the tenant

Digitized by Google

because they are not presumed to have been annexed with the intention of making them permanent additions to the realty and they continue to be personal property.

6. ———: ———: ———: ———: ———: **Fire Insurance.** In an action on a fire insurance policy to recover for the destruction of ice plant machinery which was being operated in a building located on a railroad right of way, a portion of which right of way had been leased to the plaintiff, the evidence is examined and *held* not to show that the machinery or building were so incorporated with the freehold as to become a permanent part thereof and that as between the landlord and tenant the reasonable conclusion is that they remained personal property.

7. **FIRE INSURANCE: Pleading: Valued Policy Law: Real Property.** In an action to recover insurance for damages caused by fire, since the adoption of section 7020, Revised Statutes 1909, which is called the valued policy law, the petition in cases where real property is insured need not state the value of the property; the policy fixes the value.

8. **CONTRACTS: Must Yield to Statutory Provisions: Fire Insurance.** Laws in existence at the time of the making of a contract are necessarily referred to in all contracts made under such laws, and no contract can change the law and so in insurance policies the stipulation in the policy must yield to the statute.

9. **FIRE INSURANCE: Real Property: Total Loss: Burden of Proof.** Under sections 7020 and 7021, Revised Statutes 1909, the mode of estimating the depreciation and the burden of proving the depreciation is confined exclusively to total loss in cases of insurance of real estate.

10. ———: **Valued Policy Law: Three-fourths Clause: Real Property: Personal Property.** Section 7030, Revised Statutes 1909, which provides that no company shall take any risk on any property in this state at a ratio greater than three-fourths of the value of the property insured and when taken its value shall not be questioned in any proceeding, has been *held* to be a general provision applying to both real and personal property.

11. ———: ———: **Personal Property: Burden of Proof.** Under the insurance laws of this state a fire insurance policy on chattels is valued only to the extent of precluding the company from denying that value at the time the policy was written, but the burden is upon the plaintiff to show the value of the property insured at the time of the fire.

Digitized by Google

12. ————: ————: **Evidence of Value: Harmless Error.** In an action on a fire insurance policy covering ice plant machinery, where the plant has been running five years before the policy was issued and the fire took place fifty-one days after the policy was issued, it was *held* not prejudicial error for the trial court to refuse to allow a witness to testify concerning the purchase price of the machinery at the time it was installed, five years previous thereto.

13. ————: ————: ————. In an action on a fire insurance policy covering ice plant machinery, it is *held* that the cash value of plaintiff's property at the time it was destroyed by fire was in issue and that the trial court should have admitted in evidence the testimony of defendant's witnesses, tending to show the value at the time of the destruction of the property by fire.

14. ————: ————: **Personal Property: Value of Property: After Fire.** The legal definition of what constitutes a total loss as these words are used in the statute concerning valued policies, has no application to cases of insurance of personal property and the adjustment of losses thereunder and if any of the personal property insured after the fire is suitable for any purpose and by reason thereof has a market value, such value should be taken into consideration in ascertaining plaintiff's actual loss.

15. ————: **Pleading: Personal Property.** In an action on a fire insurance policy covering personal property, the petition should state the value of the property at the time of the fire, what pecuniary interest the plaintiff had in it and that the loss was due and payable.

Appeal from Dent Circuit Court.—*Hon. L. B. Woodside,* Judge.

REVERSED AND REMANDED.

*Fyke & Snider* for appellant.

(1) Defendant should not have been permitted to show the value of the property insured immediately before it was damaged and the court's refusal to permit the introduction of evidence to that end was error. Stevens v. Ins. Co., 120 Mo. App. 107; Surface v. Ins. Co., 157 Mo. App. 570; Burge v. Ins. Co., 106 Mo. App. 255; Howerton v. Ins. Co., 105 Mo. App. 575;

Digitized by Google

Gustin v. Ins. Co., 164 Mo. 172. (2) The three-fourths value clause, or condition of the policy plainly and legally limits the liability of the defendant to its pro rata share of the three fourths of the value of the property at the time of the fire. Surface v. Ins. Co., 157 Mo. App. 570; Singleton v. Ins. Co., 45 Mo. 250; Roberts v. Ins. Co., 94 Mo. App. 142; Malin v. Ins. Co., 150 Mo. App. 642; Ins. Co. v. Johnson, 127 S. W. 765; Blum v. Ins. Co., 85 Me. 389; Brown v. Ins. Co., 105 Mass. 396; Huckins v. Ins. Co., 31 N. H. 238; Cheesboro v. Ins. Co., 61 Mich. 333. (3) It is admitted there was a disagreement between the parties as to the amount plaintiff's property had been damaged. Thereupon defendant requested and it was incumbent on plaintiff to have the damage appraised, and under the contract until an appraisal was had a right of action could not mature. The court erred in disregarding this condition of the contract and the appraisal agreement as indicated by the declaration given by the court on its own motion. Gragg v. Ins. Co., 132 Mo. App. 405; Murphy v. Ins. Co., 61 Mo. App. 323; McNess v. Ins. Co., 69 Mo. App. 238; Zalisky v. Ins. Co., 108 Ia. 341, 79 N. W. 69; Graham v. G. A., 79 N. E. 930; Fowbile v. Ins. Co., 106 Mo. App. 527.

*S. M. Meeks* and *Geo. M. Miley* for respondent.

(1) Defendant offered no testimony and made no attempt to show any depreciation in the value of the property during the fifty-one days which elapsed between the date of the policy and the burning of the property nor that the property was worth less at the date of the fire than at the date of the policy, nor as to the value of the property insured at the date of the fire. Rogers v. Ins. Co., 139 S. W. 266. (2) There was no error on the part of the court in refusing defendant's declarations of law, 5 and 6, because they were not predicated upon the evidence and the ques-

Digitized by Google

tion was fully covered, in view of the testimony, by the declaration of law given by the court and set out at page 43 of appellant's abstract. Rogers v. Ins. Co., 139 S. W. 267. (3) The court found as a matter of fact that the failure of the effort to arbitrate or appraise was without any fault or wrong doing on the part of the plaintiff and there is abundant evidence to support this finding.

NIXON, P. J.—This was an action by the plaintiff on a policy of fire insurance upon property situate in Thayer, Mo. The plaintiff obtained judgment for the sum of $300 on his frame, metal roof, building, and the sum of $2080 on his machinery, from which the defendant has appealed.

The petition on which the case was tried is as follows (formal parts omitted):

"Plaintiff for his cause of action states that the defendant is, and was at all times hereinafter mentioned, a corporation, duly organized and existing, and doing a fire insurance business, under the laws of the state of Missouri, with right to sued and be sued.

"Plaintiff further states that on the third day of November, 1910, he was doing business in Thayer, in said state of Missouri, in the name of Crescent Ice Company, and on that date defendant by its local agent, George M. Durst, made its policy of insurance whereby in consideration of the payment by plaintiff to defendant of the premium of fifty dollars, defendant insured plaintiff against loss or damage by fire to the amount of three hundred dollars on his frame, metal roofed building situated on the Frisco railroad grounds, southeast of the roundhouse in Thayer, Mo., and twenty-two hundred dollars on boiler, engine, compressor, condensers, brine tank, and all pipes and other permanent fixtures connected with and used for the making and keeping of ice—and also on bottles, cases, filters, tables and such other fixtures and ma-

Digitized by Google

chinery as is commonly used in bottling works, all while contained in the said biulding, from noon of the third day of November, 1910, to noon of the third day of November, 1911. Said policy is herewith filed, marked 'Exhibit A,' and made a part hereof. That the language above used in the description of the property so insured is an exact copy of the language used in said policy for said purpose.

"Plaintiff further states that at the time of the issuing of said policy, and at all times from said date to the occurrence of the fire hereinafter mentioned, plaintiff had an interest in all the property insured, as owner thereof, to an amount in each case exceeding the amount of said insurance.

"That on the twenty-fourth day of December, 1910, and while said policy was in force, all of the property herein described was totally destroyed by a fire, including said building, while all the other property mentioned in said policy and covered by the same, was contained in said building, and all situated in Oregon county in the state of Missouri.

"That there was other and additional insurance upon said property, but that the same same was taken out with the knowledge and consent of the defendant and that at all times herein mentioned, up to the occurrence of the fire herein described, the plaintiff had an interest in all of the property insured, as owner thereof, to an amount in each case exceeding the amount of the aggregate of all the insurance upon said property.

"That plaintiff duly performed all of the conditions required of him by the terms of said policy and in due time after said fire, and more than sixty days before the commencement of this action, to-wit, on the twentieth day of February, 1911, gave to the defendant due notice and proof of the fire and loss aforesaid, and demanded payment of the sum insured.

Digitized by Google

But defendant has failed and refused and still fails and refuses to pay the same.

"Plaintiff further states that the defendant has vexatiously refused to pay the amount of said loss under said policy.

"Wherefore plaintiff prays judgment for the sum of twenty-five hundred dollars, with interest thereon, and for the further sum of two hundred and fifty dollars because of said vexatious refusal to pay said loss, and for a reasonable attorney's fee for plaintiff's attorney."

The answer of the defendant sets up, among other things, the following provisions of the policy:

"This company shall not be liable for a greater amount than three-fourths of the actual cash value of the property covered by this policy at the time of the loss, and in case of other insurance, whether policies are concurrent or not, then for only its pro rata proportion of such three-fourths value.

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained and estimated according to such actual cash value, with proper deductions for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers as hereinafter provided, and the amount of loss or damage having been thus determined the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate or satisfactory proofs of the loss have been received by this company in accordance with the terms of this policy.



Digitized by Google

"In the event of disagreement as to the amount of the loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one and the two so chosen shall first select a competent and disinterested umpire, the appraisers shall then together estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their difference to the umpire and the award in writing of any two shall determine the amount of such loss, the parties thereto shall pay the appraisers, respectively selected by them and bear equally the expenses of the appraisal and umpire."

The plaintiff did not file a reply.

Plaintiff at the time of taking out the insurance was doing business in the town of Thayer under the name of the Crescent Ice Company & Bottling Works of which he was the owner. The policy of insurance in question provided for insurance on two separately enumerated items of property, viz.: Three hundred dollars on the frame, metal roof, building, of the plaintiff situate on the grounds of the St. Louis & San Francisco Railroad Company, and twenty-two hundred dollars on the boiler, engine, compressor, condensers, brine tank, pipes and other permanent fixtures connected with and used for the making and keeping of ice, bottles, cases, fiilters, tables, and other fixtures and machinery commonly used in bottling works. The entire insurance on the building and contents was ten thousand dollars, distributed as follows:

Fidelity-Phoenix Fire Insurance Co., $250 on building, $2,000 on machinery.

Insurance Company of North America, $325 on building, $2,300 on machinery;

St. Paul F. & M. Insurance Co., $325 on building, $2,300 on machinery;

Digitized by Google

Niagara Fire Insurance Co., $300 on building, $2,200 on machinery.

Plaintiff had leased the ground on which the building stood from the St. Louis & San Francisco Railroad Company for a term of ten years. There were two buildings for which plaintiff said he paid $650; one of them was a stone building and was not burned; plaintiff testified that he bought the buildings about a year before he put in the ice plant. The capacity of the ice plant was about six tons daily, and it had been in about five years before the fire occurred; it was a complete outfit and was purchased from F. W. Wolf & Company of Chicago a short time before it was set up. The plaintiff testified that as a result of the fire the building insured was a total loss. Also that the bottles were melted, cases burned, filters damaged, and that the sides of the brine tank were warped by the heat and not in fit condition for use and that to have it repaired would require taking it apart and re-riveting it, which could be done by sending and getting a man to do the work. That the condensers were also damaged, but could be repaired, which, however, would necessitate sending them elsewhere to be tested. That the engine was in such condition that it was only fit for a sawmill and cheap purposes and would not do for manufacturing ice. There was no testimony as to the boiler. About four hundred cases estimated to be worth one dollar and twenty cents each were not burned, making a total of $480.

After the fire, the parties having failed to agree on the amount of loss and damage, entered into a written appraisal agreement (on January 16, 1911) in which Joseph Raskilly was selected by the insurance company and William Bailey was selected by the plaintiff as appraisers to estimate and determine the value and the loss and damage by the fire, and they were to proceed as outlined in the portions of the policy of insurance hereinbefore set out. As we have seen, the

Digitized by Google

provision of the policy was that the two appraisers should select a competent and disinterested umpire, and that the appraisers should then together estimate and appraise the loss. After a prolonged effort on the part of the two appraisers they failed to agree on a third man to act as umpire. During this period, Raskilly suggested some five persons to act as umpire, and numerous others were suggested by Bailey, but all of them were rejected for one reason or another. The evidence on this portion of the case tended to support the conclusion of the trial court that the failure to agree on a man to act as umpire was not due to any wrongdoing or misconduct by plaintiff or his appraiser. The effort to arbitrate the loss was finally abandoned and plaintiff commenced this suit. We are of the opinion that the commencement of the suit under the circumstances was not premature.

The appellant contends that it was entitled to judgment because the answer set up matter which if true is a complete legal defense, and that as no reply was filed by the plaintiff, defendant was entitled to judgment on the pleadings.

The law is well settled in this state that after trial and verdict without any objection that a reply has not been filed, and when the trial has been conducted as though a reply had been filed, no advantage can be taken of such omission and the failure to reply will be considered waived. [Ferguson & Wheeler v. Davidson, 147 Mo. 664, 49 S. W. 859; State ex rel. Steel v. Phillips, 137 Mo. 259, 38 S. W. 931.]

The fundamental question that lies across the threshhold of this case is whether the subject-matter of the insurance was personal property or real estate. The court tried the case on the theory that there was a total loss and that the property insured was real estate, or on the theory that since the adoption of the so-called valued policy law in this state, the statutory provision for the adjustment of fire losses are the

Digitized by Google

same whether the property destroyed is personal or real. As we have seen, the evidence tended to show that the building containing the machinery comprising the ice plant and soda pop factory was standing on the right of way of the St. Louis & San Francisco Railroad Company which had been leased to plaintiff prior to the time of the issuance of the insurance policy in question, and that the boiler, engine, compressor, condensers, brine tank, and pipes, comprising the machinery of the plant were in the frame, metal roof, building insured and were used for making and keeping ice, and that the bottles, cases, filters, etc., were such as are commonly used in bottling plants. Under the evidence it is apparent that the relation of the plaintiff to the railroad company was that of a tenant. It is an elementary principle of the common law that land includes houses and buildings standing thereon, and that whatever is affixed to the soil is thereby made a part of it and passes by grant of the land without other designation. Personal property prepared and intended to be used with the land, having been affixed to it and used with it, becomes a part of it by accession. To this general principle there are equally well-settled exceptions under which fall trade fixtures, and as between landlord and tenant annexations made by the tenant in aid of his trade are on grounds of public policy removable by the tenant because they are not presumed to have been annexed with the intention of making them permanent additions to the realty, and they continue to be personal property. [Havens v. Fire Ins. Co., 123 Mo. l. c. 419, 27 S. W. 718.] It is said that there is no precise definition of a trade fixture; but generally where additions to the realty are to the pecuniary advantage of the tenant they are probably trade fixtures. [19 Cyc. 1065.] In the absence of contract there are certain limitations on the right of the tenant to remove trade fixtures occasioned by the nature of the fixture,

Digitized by Google

degree of annexation, the effect of removal from the freehold, and several other restrictions; among others, where the fixture is so incorporated with the realty as to show an intention to make it a permanent addition or where its removal will seriously injure the realty. In this case the evidence fails to show any express contract between the railroad company as lessor and the plaintiff as lessee as to the conditions on which the plaintiff attached the ice plant and soda pop factory to the building, but they were undoubtedly attached for the advantage of the tenant. The evidence was insufficient to warrant the conclusion that the subject-matter of the insurance in this case was other than trade fixtures as the evidence did not show that the machinery or building were so incorporated with the freehold as to become a permanent part thereof, and hence as between landlord and tenant the reasonable conclusion is that they remained personal property.

In actions to recover insurance for damage caused by fire, since the adoption of section 7020, Revised Statutes 1909, which is called the valued policy law, the petition in cases where real property is insured need not state the value of the property; the policy fixes that. [Bode v. Firemen's Ins. Co., 103 Mo. App. 289, 77 S. W. 116; Jones v. Philadelphia Underwriters, 78 Mo. App. 296.] As to such policies, after that act took effect, the act itself is to be treated as if incorporated therein, the general rule being that laws in existence are necessarily referred to in all contracts made under such laws and that no contract can change the law, and that in such cases the stipulation in the policy must yield to the statute. [Havens v. Fire Ins. Co., supra, l. c. 417.] This statute expressly provides that "in case of total loss of the property insured, the measure of damages shall be the amount for which the property was insured, less whatever depreciation in value, below the amount for which the property is

Digitized by Google

insured, the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant; . . . . ." However, by section 7021, it is provided that this and the preceding section shall apply only to real property insured and that any condition in any policy of insurance contrary to the provisions of this article shall be illegal and void. Under the express terms of these sections, therefore, the total loss and the mode of estimating the depreciation and the burden of proving the depreciation is confined exclusively to total loss in cases of insurance of real estate. Section 7030 of the same chapter provides that no company shall take any risk on any property in this state at a ratio greater than three-fourths of the value of the property insured, and when taken, its value shall not be questioned in any proceeding. This provision has been held to be a general one and to apply as well to real as personal property. [Howerton v. Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27.] And a policy on chattels is valued only to the extent of precluding the company from denying their value when the policy was written. [Stevens v. Fire Ins. Co., 120 Mo. App. 88, 96 S. W. 684.]

The court of its own motion gave the following declaration of law:

"The court declares that as the law prohibits an insurance company insuring property at more than three-fourths of its value, it will be presumed in the absence of evidence of fraud, in such valuation, that the property at the time the insurance was taken was of the value of one-third more than the amount for which it was insured and as there is no evidence in this case of any depreciation of value from the time of the insurance until the time of the fire, and no evidence that the property burned was of any value after the fire, and the only evidence as to any change or

Digitized by Google

alteration of conditions, value, or situation of the property insured from the time of the insurance to the date of the fire, being the removal from the building of a portion of the property insured, the finding should be for the plaintiff, for the amount for which the property was insured, less the pro rata value of the property so removed and not destroyed, as between the policy sued on in this case and the other policies.

"And the court further declares that an agreement to appoint two persons as arbitrators, one to be selected by each party, and for the two to select a third party as referee, will not preclude a policy holder from suing on the policy when it appears that the arbitrators cannot agree as to such referee, and have without any fault or wrongdoing on the part of the plaintiff, entirely abandoned all efforts to arbitrate such loss."

It will be seen from this declaration of law that the court held that because there was no evidence of the depreciation of value of the property insured between the date of the insurance and the time of the fire and because there was no evidence that the property burned was of any value after the fire and no showing that the situation of the insured property from the date of the insurance to the date of the fire was changed, the plaintiff should recover the full value for which the property was insured less the pro rata value of the property removed. This was a trial of the case on the theory that the property insured was real estate. But as the property insured was personal property, it was erroneous to declare that it devolved upon the defendant to show the actual value of the property at the time of the loss as the policy provided that the damage should be ascertained and estimated in accordance with the actual cash value with proper deduction for the depreciation, however caused. In such case it devolved upon the plaintiff

Digitized by Google

to show the actual cash value of the property insured at the time of the fire and his consequent loss by reason of its destruction; but as evidence of the value of the property at the time of the loss he would have a right to show that the property having been insured for three-fourths of its value under section 7030 its value at the time of the fire was four-thirds of the amount of the insurance, and the defendant company would be estopped from denying that such was not the true value of the property on the date the policy of insurance was issued. The effect of this statute is very clearly stated in Stevens v. Fire Ins. Co., 120 Mo. App. l. c. 107, 108, 96 S. W. 684, as follows: "It does not command that for all the years of the risk covered by the policy and during its life the goods shall remain at the value of $800, or of any other amount. It operates only to fix the value at the time of the issuance of the policy and denies the right of the insurance company to thereafter say that at that time they were not of the value mentioned. . . . That the whole theory of insurance is based upon the idea of indemnity only, is fundamental, and except something more than this is affixed by the statute or policy, the insurer, as a matter of common justice, has the right always to settle on the basis of indemnity for the loss suffered. . . . The section of the statute quoted renders the policy on chattels valued only in so far as it precludes the company from denying their value as mentioned when the insurance was written, and aside from this, it does not influence the question in the least."

At the trial of this case on cross-examination of the plaintiff he stated that he purchased his ice plant, being a complete outfit, from F. W. Wolf & Company of Chicago, and that it had been run about five years prior to the time of the fire. He was then asked by the defendant what was the purchase price at that time. The court, on objection of the plaintiff,

Digitized by Google

refused to allow the witness to answer on the ground that the defendant under the statute could not show the value of the property insured, at the time of the insurance, to be less than the amount for which it was insured. As the fire took place fifty-one days after the policy was issued and the plant had already been run five years, we are of the opinion that no prejudicial error was committed by excluding this evidence.

The defendant subsequently introduced as a witness Joseph Raskilly who qualified as an expert in the sale and erecting of ice machinery and who stated that on December the tenth and on January the eleventh he was familiar with the cost and value of ice machinery and was familiar with the machinery that F. W. Wold & Company of Chicago manufactures and puts up. After having thus qualified as an expert as to his knowledge of machinery similar to that of the plaintiff, he was asked this question: "At the time named, December 24, 1910, state to the court the value of one of such plants of six ton capacity, installed and ready to run at Thayer, Mo." He was also asked whether he was able to state at that time what it would cost to purchase and install one of Wolf's plants such as had been described to him, after he had stated that he knew the value of such a plant. The answers to the above questions were objected to by the plaintiff and sustained by the court. As the cash value of the plaintiff's property at the time it was destroyed by fire on December the tenth was in issue, we think the evidence was competent and admissible, its probative value to be determined by the triers of the fact.

The legal definition of what constitutes a "total loss" as these words are used in the statute concerning valued policies has no application to cases of insurance of personal property and the adjustment of losses thereunder. The plaintiff's evidence tended to show that the fire did not cause a total loss of the property covered by his policy of insurance. The

Digitized by Google

plaintiff as a witness testified that while the brine tank was warped by the heat, it could be repaired by sending for a man and having the tank taken apart and re-riveted; that as to the condensers the solder on the ends was melted and while they would be useless for making ice they could probably be repaired but that they would have to be sent elsewhere to be tested; that as to the engine, it could be repaired so as to be used for a sawmill and cheap purposes; as to the condition of the boiler no evidence was offered. If any of the property insured, after the fire, was suitable for any purpose and by reason thereof had a market value, such value should be taken into consideration in ascertaining plaintiff's actual loss or the damage he had suffered.

As this case is to be re-tried on the theory that the subject-matter of the insurance was personal property, it is suggested that plaintiff amend his petition so as to conform to that theory, and that his petition should state the value of the property at the time of the fire, what pecuniary interest he had in it, and that the loss was due and payable.

We are of the opinion that the case was tried on the wrong theory, and the judgment is accordingly reversed and the cause is remanded for a new trial. All concur.

Digitized by Google

# CENTER CREEK MINING COMPANY, Respondent, v. T. F. COYNE et al., Appellants.

**Springfield Court of Appeals, May 6, 1912.**

1. **MECHANICS' LIENS: Releasing Right to Lien: Setting Aside Judgment.** In an action in equity to set aside and cancel a mechanic's lien judgment obtained by the defendants against the improvements which had become a part of plaintiff's real estate, the judgment having been obtained against plaintiff's tenant, it appeared that plaintiff claimed title through the foreclosure of a mortgage given by the tenant, the mortgage having been given to secure a loan. It also appeared that the defendants had furnished the plaintiff with a statement of their account against the tenant and agreed that if plaintiff would make the loan, a part of which was to satisfy defendants' claim, that defendants would accept two promissory notes in addition to the cash payment in full satisfaction of the indebtedness and claim against the property. *Held*, that under the evidence the defendants had released their right to the lien when the loan was made by the plaintiff under the agreement with them, and the plaintiff not having been made a party to the lien judgment would not be effected by it and the trial court properly set the same aside, so far as it effected plaintiff's rights.

2. **DEBTOR AND CREDITOR: Offer of Settlement: Acceptance in Entirety: Equity.** Where a sum of money and promissory notes are left by the debtor with one member of a creditor firm with the understanding that they were to be received in full settlement of an account against the debtor, it being understood that the money and notes were left for the approval of another member of the firm, and the firm appropriates the money and credits the same on the debtor's account and after the notes are past due, attempts to repudiate the transaction, so far as the settlement and notes are concerned, a court of equity will not permit such repudiation, for it was the duty of the creditor to either receive the notes and money tendered in settlement of the account, for which they were offered, or reject the offer in its entirety.

3. **CONTRACTS: Offer and Acceptance: Accepting in Part: Equity.** Equity will not allow parties to appropriate the part of a transaction that is favorable to them and reject that which is not, thereby assuming the inconsistent position of affirming a contract in part and disaffirming it in part.

Digitized by Google

4. **APPEAL AND ERROR: Action in Equity: Reviewing Evidence.** While an appellate court is authorized to review the evidence in an equity case, yet in determining the weight to be attached to the testimony of the witnesses, where it is oral and conflicting, deference will be given to the opinion of the trial court, who had the opportunity of seeing the witnesses face to face and observing them while they were testifying.

5. **MECHANICS' LIENS: Release: Reviving Lien.** A party entitled to a mechanic's lien may waive, discharge or release the same and having done so for a proper consideration, he cannot afterwards revive the lien.

6. **———: Filing True Account: Giving Proper Credits.** The law granting liens to mechanics and materialmen requires that they shall file a just and true account of the demands due them after all just credits have been given and unless the account is correct and the proper credits have been given in compliance with the statute, a party cannot enforce his lien upon the property of the owner of the building, but the rights of the lienor are not lost where he unintentionally fails to enter in his account the full amount of the credits to which his debtor is entitled.

7. **———: Extraordinary Remedy: Complying with Statute.** The enforcement of a mechanic's lien is a special and extraordinary remedy or privilege given by the law, and one attempting to avail himself of the advantage of such lien must fully comply with the provisions of the law conferring it.

8. **CORPORATIONS: Chattel Mortgage: Defective Acknowledgment: Mortgagee's Possession of Property.** A chattel mortgage of a corporation is invalid as to any person other than the parties thereto, unless possession of the mortgaged property is delivered to the mortgagee, where the acknowledgment of the president of said corporation fails to state that the president signed and sealed the instrument in behalf of said corporation, by authority of its board of trustees or directors, as required by section 2799, Revised Statutes 1909. But the mortgagee's title would be good where he takes possession as purchaser at a foreclosure sale under the mortgage.

9. **LANDLORD AND TENANT: Fixtures: Purchase by Landlord: Real Property.** Although as between the landlord and tenant the improvements erected by the tenant on the real estate may be personal property, yet where the landlord purchases such improvements they become by operation of law a part of the freehold and would follow its ownership as fully as if they had been constructed by the landlord in the first instance.

10. **INJUNCTIONS: Equity: Removing Cloud From Title: Mechanics' Liens: Setting Aside Judgment.** In action to set

Digitized by Google

aside a mechanic's lien judgment and to enjoin a sale of property thereunder, where the facts showing the invalidity of the lien were outside of the record and rested in parol and could only be shown by extrinsic evidence, equity will exercise jurisdiction to protect the real property and remove the cloud from the title resulting from such judgment.

11. **MECHANICS' LIENS: Parties Defendant: Interested Parties Not Bound, When.** Where a person interested in property sought to be charged with a mechanic's lien is not made a party to the proceedings, he is not bound by the judgment.

Appeal from Jasper Circuit Court.—*Hon. David E. Blair,* Judge.

AFFIRMED.

*Frank L. Forlow* and *H. S. Miller* for appellants.

(1) The rule is that where non-lienable items are included in the mechanic's lien account filed in the office of the clerk of the circuit court that if they can be easily segregated from the lienable items and if the lienor did not know at the time he filed the account that there was included in it the non-lienable items, the inclusion of such item will not vitiate the lien. Kittrell v. Hopkins, 114 Mo. App. 431. (2) Also it is held in the case of Ulrich v. Osborne, 106 Mo. App. 492, that where they are included in the lien accounts a few small items which did not go into the building, they will not in the absence of bad faith vitiate the lien especially where they are separable with the amounts from other items. (3) The acknowledgment to the chattel mortgage is defective and the record of an imperfectly acknowledged chattel mortgage imparts no notice in this suit. Selking v. Hebel, 1 Mo. App. 340; Pullis v. Pullis, 157 Mo. 565. (4) It is not necessary to make the Center Creek Mining Company a party to the mechanic's lien suit by the appellant herein against the Good Shepherd Mining Company. The question of the ownership of

Digitized by Google

the property does not arise in a mechanic's lien suit nor in proceedings to enforce the same. If in point of fact the Good Shepherd Mining Company had no interest in the property the purchaser at the sheriff's sale under the special execution would get no title but whether he gets title or not would be a matter to be settled in a future proceeding. Chambers v. Benoist, 25 Mo. App. 523; Cole v. Barron, 8 Mo. App. 509. (5) The right of the appellant to its lien could not be extinguished except by release or payment and the release will not be binding or the lien lost if given on conditions and the conditions not complied with. Rockel on Mechanic's Liens, sec. 189; Albrecht v. Lumber Co., 126 Ind. 318; Katzenbach v. Holt, 43 N. J. Eq. 536. (6) The notes taken by the appellant under the circumstances as shown by the record in this case would not release the lien and the right to enforce it. Lumber Co. v. Christophel, 62 Mo. App. 98; Brass Co. v. Boyce, 74 Mo. App. 342. (7) This record is absolutely free from any fraud whatever in the procuring of the mechanic's lien judgment. That the proceeding in this case is a collateral attack on the mechanic's lien judgment there can be no question. Railroad v. Warden, 73 Mo. App. 117; Murphy v. De France, 150 Mo. 53; Davis v. Wade, 58 Mo. App. 641; Wyman v. Hardwick, 52 Mo. App. 621; Bracken v. Milner, 99 Mo. App. 194; Le Mesnager v. Variel, 144 Cal. 463, 77 Pac. 988, 103 Am. St. Rep. 91; Davis v. Osborne, 156 Ind. 86, 59 N. E. 279; Peters v. League, 13 Maryland 58, 71 Am. Dec. 622; Crist v. Cosby, 11 Okla. 635, 69 Pac. 885; Wood v. Elam, 4 B. H. C. 431.

*Bates & Stewart, Norman A. Cox* and *Hugh Dabbs* for respondent.

(1) An acknowledgment would be unnecessary in this case because appellants had actual knowledge

Digitized by Google

of the existence of respondent's mortgage and received $1500 out of the loan secured thereby. This mortgage is signed by the president of the Good Shepherd Mining Co., and attested by the seal of the corporation. This is sufficient. Degnan v. Thoroughman, 88 Mo. App. 62; Roth v. Wire Co., 94 Mo. App. 236; R. S. 1909, sec. 2811; Bank v. Frame, 112 Mo. 509. (2) Appellants having agreed with respondent and the Good Shepherd Mining Company to accept the $1500 and the notes in full satisfaction of its claim, for the purpose of inducing respondent to make the loan, and having received $1500 of respondent's money, are not estopped from enforcing a mechanic's lien against the property. Brick v. Sadring, 68 Mo. App. 17; Lumber Co. v. Park Assn., 64 Mo. App. 381; Bank v. Frame, 112 Mo. 513; Spence v. Renfro, 179 Mo. 421. (3) Under the mortgage and the court record, as shown by the evidence the mechanic's lien judgment obtained by appellants showed a superior lien to respondent's mortgage. Respondent not having been a party to the suit which resulted in the mechanic's lien judgment and that judgment being a fraud on its rights had a right to attack it in this proceeding. R. S. 1909, secs. 8219, 8221; Russell v. Grant, 122 Mo. 180; Fitzpatrick v. Stevens, 114 Mo. App. 502; Bank v. Davison, 40 Mo. App. 425; Sanderson v. Voelker, 51 Mo. App. 333; Wilhite v. Ferry, 66 Mo. App. 459; Clothing Co. v. Steadman, 120 Mo. App. 525. (4) While the injunction in this case is auxilliary to the suit to concel and set aside the judgment, respondent would be entitled under section 2534, Revised Statutes 1909, to maintain an original injunction against the judgment in this case as the judgment is a lien and cloud upon the title to the mill and improvements and one acre of respondent's land. R. S. 1909, sec. 2534; Russell v. Grant, 122 Mo. 175; Bassett v. Henry, 34 Mo. App. 556; Stewart v. Caldwell, 54 Mo. 539; Hanson v. Neil, 215 Mo. 283. (5) Re-

Digitized by Google

spondent is entitled to maintain this suit in equity on any one of the following grounds, fraud, equitable estoppel, cancellation and cloud on title. Williams v. Lane, 66 Mo. App. 68; Daugherty v. Rothbaum, 156 Mo. App. 219; Creamer v. Bivert, 214 Mo. 479. (6) The acceptance of the $1500 out of respondent's loan and the two notes of $500 each was all one transaction. Under the law appellants will not be permitted to accept the benefits of the transaction and repudiate the part which is not beneficial. Grooms v. Mullet, 133 Mo. App. 481; Austin v. Loring, 63 Mo. 22; Nelson v. Hirsh, 102 Mo. App. 513.

NIXON, P. J.—This was an action in equity instituted by the Center Creek Mining Company to set aside and cancel a mechanic's lien judgment obtained by the defendants, a copartnership, against the Good Shepherd Mining Company, a corporation, and restrain the collection of the same, the plaintiff claiming that said judgment was invalid and that it declared a lien and cast a cloud upon plaintiff's title. A temporary injunction was issued restraining the collection of the judgment and on final hearing was made perpetual. Defendants have appealed.

The evidence in the case tended to support the allegations of the petition which is substantially as follows (formal parts omitted):

"Plaintiff for its amended petition and cause of action states that at all times hereinafter mentioned, it was, and is now, a corporation, organized and doing business under the laws of the State of Missouri; that during said period defendants, T. F. Coyne, Ed. Foster and W. W. Davis, were, and still are, copartners engaged in the retail lumber business in Webb City, Missouri, under the name and style of the Coyne Lumber Company; that the hereinafter mentioned Good Shepherd Mining Company was also during said



Digitized by Google

period and is now a corporation organized and existing under the laws of the State of Missouri; that the defendant Arch McDonald has been for more than one year next preceding the date of filing this petition the duly elected, qualified and acting sheriff of Jasper county, Missouri.

"Plaintiff states that on or about the fifteenth day of January, 1908, the said Good Shepherd Mining Company entered into a contract with the plaintiff whereby it leased to the said Good Shepherd Mining Company for a period of years for mining purposes all of lots numbered 84, 85, 86, 87, 88, 97, 98, 99, 100, and fractional lots numbered 101, 102, 103 and 104, respectively of the Center Creek Mining Company's land, all located in the southwest quarter of the northwest quarter of section seventeen (17), township twenty-eight (28), range thirty-two (32), Jasper county, Missouri; that said contract among other things provided that said Good Shepherd Mining Company would own and might remove therefrom, all fixtures and improvements placed by it on the said lots, at the expiration or forfeiture of said lease; that under the terms and provisions of said lease, said Good Shepherd Mining Company constructed a mining concentrating plant, including main buildings, derrick, hoppers, machinery, tramways, office buildings, etc., on one or more of the said lots; plaintiff further states that after the completion of the said mining plant and on or about the first day of August, 1908, the Good Shepherd Mining Company could not proceed with its operations for the want of funds; that in the building and construction of said mining plant, building, machinery and improvements, it had incurred a large amount of indebtedness, its creditors being the defendant Coyne Lumber Company, a partnership composed as aforesaid; the Webb City Foundry & Machinery Company, Manley & Landreth of Joplin, Missouri, and Putman and Bryant of

Digitized by Google

Webb City, Missouri. That at said times the claims of said creditors were for materials used for the improvements on said lease, the said creditors being entitled under the law to enforce their claims under the mechanics' lien laws for said improvements.

"Plaintiff states that on the tenth day of August, 1908, the Good Shepherd Mining Company applied to it for a loan with which to discharge its then existing indebtedness to the aforesaid creditors and to create a fund with which to continue mining operations. Plaintiff states that through its secretary and general manager it agreed with the Good Shepherd Mining Company to make a loan provided all lienable claims and debts existing and owing by said company at the time be paid off and discharged so that plaintiff's loan could be secured by a first mortgage on said mill and improvements, concentrating plant and machinery aforesaid; that thereupon the said Good Shepherd Mining Company stated to plaintiff that it could arrange with said creditors so that each would receive a part payment of their several claims in cash and take the individual note of the Good Shepherd Mining Company, with the guaranty of the president of said company, in full satisfaction and discharge of said indebtedness, so that the same would no longer be a lienable claim against said property.

"Plaintiff further states that with a view of carrying out said arrangement, A. L. Shepherd, president of the Good Shepherd Mining Company, went to the Coyne Lumber Company to ascertain the amount of the indebtedness then owing it by the Good Shepherd Mining Company, and that the Coyne Lumber Company, through T. F. Coyne, a member of said partnership, rendered to the said Shepherd for the plaintiff, a statement of its indebtedness as follows, to-wit:

Digitized by Google

"'Webb City, Mo., July 31, 1908.

"'The balance due to date on Good Shepherd account is twenty-five hundred ($2500) dollars.

"'COYNE LUMBER COMPANY,

"'By T. F. COYNE.'

"Plaintiff further states that for the purpose of carrying out said arrangement the said Good Shepherd Mining Company through its said president ascertained the indebtedness of the other above named companies.

. . . . . .

"Plaintiff further states that the Coyne Lumber Company, being a partnership composed of the members hereinbefore set out, through said W. W. Davis, a member of said firm then in charge of its office and place of business, agreed with the plaintiff and the Good Shepherd Mining Company, that if fifteen hundred dollars in cash would be paid upon its account at that time, to-wit, August —, 1908, it would accept two promissory notes of said company for five hundred dollars each, guaranteed by A. L. Shepard as the president thereof, in full satisfaction, payment and discharge of its claim against the Good Shepherd Mining Company, the same to be written across the face of said notes, if the plaintiff would make said loan to the Good Shepherd Mining Company, so as to enable it to pay said amount. . . . Plaintiff states that with full knowledge of the facts above set forth the said W. W. Davis, agent and member of said firm, received said payment of fifteen hundred dollars in cash, and accepted the two promissory notes of the Good Shepherd Mining Company at said time for five hundred dollars each, guaranteel by A. L. Shepard as president thereof, in full satisfaction, payment and discharge of said indebtedness, owing said partnership by the Good Shepherd Mining Com-

Digitized by Google

pany. Plaintiff states that a similar arrangement was made with the other creditors named above.

"Plaintiff states that relying upon said arrangement, agreement, understanding and facts as aforesaid, it did loan to the Good Shepherd Mining Company for the purposes herein stated, the sum of eight thousand, five hundred dollars, and took a mortgage and conditional sale of said property as security therefor. That the terms of said sale provided that in case of default of the payment of the promissory notes and interest in said loan, plaintiff might take possession of said property, and sell the same at public auction; that said Good Shepherd Mining Company defaulted in the payment of said principal and interest; that said plaintiff took possession of said property, advertised it for sale, as provided in said contract of sale, on the sixth day of February, 1909, the date it was to be sold, purchased it at public auction and has ever since been and is now the absolute owner thereof. Plaintiff states that it is and was at all times mentioned in the petition in this case the owner in fee of the real estate on which the mill and improvements described in plaintiff's petition is located.

"Plaintiff further states that on the twelfth day of December, 1908, the said Coyne Lumber Company, . . . filed a mechanic's lien statement in the office of the circuit clerk of Jasper county, Missouri, for the indebtedness hereinbefore st forth . . . . That said statement, among other things, described said mining plant and other improvements made by the Good Shepherd Mining Company and one acre of ground upon which said improvements were located, and among other things said statement alleged that the work and labor done, material, lumber, fixtures, etc., mentioned therein, were furnished by the said Coyne Lumber Company, under contract therefor for the Good Shepherd Mining Company, and that the

Digitized by Google

work described and materials furnished was done on said premises, and that the materials were used in said improvements and became a part thereof and that the Good Shepherd Mining Company was the owner thereof and of the lease, or license interest in said land upon which the said improvements were made and described therein and that the value of the work and labor done and of the materials furnished under said contract up to and including July 31, 1908, was of the value of six thousand three hundred forty-two and ninety-eight one-hundredths dollars and that the balance due at said time after allowing all true and just credits, was three thousand five hundred and twenty-three one-hundredths dollars, and that after this time there was work and labor done and materials furnished under said contract of the value of three hundred seventy-five and fifty one-hundredths dollars and that on the tenth day of August, 1908, there was a cash credit of fourteen hundred sixty-four and fifty-nine one-hundredths dollars and that the balance due and unpaid on the eleventh day of December, 1908, was the sum of two thousand fifty-eight and fifty-five one-hundredths dollars.

"Plaintiff states that the correctness of all said allegations and descriptions mentioned in said mechanic's lien statement were verified by oath of defendant T. M. Coyne, and that the same was subscribed and sworn to on the eleventh day of December, 1908.

"Plaintiff states further that on the sixth day of February, 1909, the said defendants T. F. Coyne, W. W. Davis, and Ed. Foster through their attorney commenced suit in the circuit court of Jasper county, Missouri, at Joplin, and made the Good Shepherd Mining Company the sole defendant therein; that the nature and purpose of said suit was to secure a mechanic's lien on the property described in the afore-

Digitized by Google

said mechanic's lien statement and again described in the petition filed in said suit.

"Plaintiff states that service on said defendants was made by publication and that judgment for mechanic's lien was declared on said property and acre of ground in the principal sum of two thousand fifty-eight and fifty-five one-hundredths dollars and interest thereon from December 11, 1908, and for costs and that said judgment lien was entered of record. . . .

"Plaintiff further states that in pursuance of said judgment the clerk of this court issued a special execution and delivered the same to the defendant Arch McDonald as sheriff, wha has levied upon the said property against which said judgment lien was rendered and has advertised the same for sale on the thirty-first day of January, 1910." . . .

The controversy between the litigants in this case over vital points focuses upon what transpired at a meeting of L. E. Bates and A. L. Shepard on the one side and W. W. Davis on the other side, which took place at the office of the defendant company on the tenth day of August, 1908. Prior to the time of this interview the evidence shows that the mill and mining property of the Good Shepherd Mining Company was of the value of some five or six thousand dollars, and that this company was in failing circumstances, its indebtedness being some twelve thousand dollars, and that the president of the Good Shepherd Mining Company, A. L. Shepard, was endeavoring to make a compromise settlement with creditors and that for such purpose it became necessary to make a loan. To that end, on the thirty-first day of July, he had an interview with T. F. Coyne, managing member of the defendant partnership. In this interview Coyne was asked by Shepard to figure up the amount of indebtedness due the defendant, which was found to amount to three thousand one hundred two and sixty-five one

Digitized by Google

hundredths dollars. Coyne was then informed by Shepard that he was trying to negotiate a loan for seven thousand dollars and asked Coyne to give the Good Shepherd Mining Company a statement of its account as of twenty-five hundred dollars and that he would give the defendant partnership a note for the balance. For the purpose of procuring a loan defend ant partnership did give Shepard the following state ment:

"Webb City, Mo., July 31, 1908.

"The balance due to date on Good Shepherd account is twenty-five hundred ($2500) dollars.

"COYNE LUMBER COMPANY,

"By T. F. COYNE."

Before this interview of August the tenth, Mr. Davis was informed that this statement for twenty-five hundred dollars had been given to Mr. Shepard for the purpose of securing a loan and that Mr. Shepard was to pay defendants twenty-five hundred dollars. Mr. Davis' account of this interview was that Bates and Shepard came to the office and Shepard said to him that he had made an arrangement with Coyne to pay the twenty-five hundred dollars in cash and that afterwards he had found that he could not pay that much but wanted to pay fifteen hundred dollars in cash and leave two notes; that a check for fifteen hundred dollars, and two notes each for five hundred dollars, were left by Mr. Shepard at his request. The second of said notes, due sixty days after date, contained this statement: "Payment in full Good Shepherd account to August 1, 1908." That this was written there in the office by Mr. Shepard. That Mr. Shepard said he would leave the fifteen hundred dollars in cash and was going to leave the notes. "I told him we had no authority and could not accept the notes; that we would keep them until we could see Mr. Coyne and submit them to him for his approval

Digitized by Google

and that was the understanding." "I knew Mr. Bates was there as attorney for the Good Shepherd Mining Company. I saw him examining the notes, but he had little to say. I did not know at the time that the Center Creek Mining Company was making the loan or was interested in the transaction."

It is incredible that the defendant firm should have understood that the notes and cash were left with them for any other purpose than in satisfaction of the entire claim of the defendant partnership against the Good Shepherd Mining Company; and further, they certainly had no authority from anything that was said by Mr. Shepard at this interview to apply the fifteen hundred dollars cash on the account of the Good Shepherd Mining Company and then submit the notes a month or so afterwards—after they were due—to Mr. Coyne to be rejected by him. Mr. Shepard, according to Mr. Davis' account, at all times insisted on leaving the notes as well as the money. The proposition will reasonably bear but one interpretation, even from the testimony of defendants themselves, and that is that there was an offer on the part of the Good Shepherd Mining Company to pay the defendant company fifteen hundred dollars in cash and give two notes for five hundred dollars each in full satisfaction of their entire indebtedness against it, and that the notes and money were received by Mr. Davis upon the express understanding that the offer was to be submitted to Mr. Coyne. Under these circumstances the appropriation by the firm on August the tenth of the fifteen hundred dollars by crediting it on the Good Shepherd account was wholly unwarranted. Their position, viewed from a reasonable standpoint, was, either to receive the notes and the money tendered, all in all or not at all. The acceptance of the fifteen hundred dollars in cash out of respondent's loan to the Good Shepherd Mining Company and the two five hundred dollar notes could be

Digitized by Google

construed to be but one transaction. Equity will not allow parties to appropriate the part of a transaction that is favorable to them and reject that which is not, thereby assuming the inconsistent position of affirming a contract in part and disaffirming it in part. One having the right to accept or reject a transaction who takes and retains benefits thereunder becomes bound by the transaction and cannot avoid its obligation or effect by taking a position inconsistent therewith; having accepted benefits from it he is estopped from questioning its existence. [16 Cyc. 787; Grooms v. Mullett, 133 Mo. App. 477, 113 S. W. 683; Cadematori v. Gauger, 160 Mo. 352, 61 S. W. 195; Light v. Railway Co., 89 Mo. 108, 1 S. W. 380.]

Mr. Bates, the agent and attorney for the plaintiff, gave substantially the following version of what took place at this interview: "We told Mr. Davis that we came down to try to make an arrangement to make the loan; that the Center Creek Mining Company would not make a loan for the full amount of the indebtedness; that they could only pay fifteen hundred dollars cash on the Coyne Lumber Company's account and that the balance would have to be in notes; that the account would have to be wiped out so that the Center Creek Mining Company could get a first mortgage on the property to secure the loan and that it would be necessary to have an understanding that the twenty-five hundred dollars was given as full payment of the account and that such was to be written across the note and the cash and notes accepted in full payment of the account. The only objection Mr. Davis made was that some material had been furnished since July thirty-first for an office building which was to be covered by the mortgage. I told him that would not make any difference; and it was then agreed that the notes were to be left there, and it was written across the notes that they were given in full payment of the account. It was explained to

Digitized by Google

him that the Center Creek Mining Company was making the loan to the Good Shepherd Mining Company and the loan would not be sufficient to pay all in cash. When this agreement was made I authorized Mr. Shepard to deliver the check. Immediately after that the mortgage or bill of sale was executed by the Good Shepherd Mining Company to the plaintiff on the property to secure the eight thousand five hundred dollar loan which went to pay the creditors of the Good Shepherd Mining Company.

In this condition of the record of the evidence presented to the trial court, we think the well-established principles governing equity practice in appellate courts should be applied, that while this court is authorized to review the evidence and facts, yet in determining the weight to be attached to the testimony of the witnesses where it is oral and is conflicting, deference will be given to the opinion of the trial court who had the opportunity of seeing the witnesses face to face and observing them while they were testifying. [Foster v. Williams, 144 Mo. App. l. c. 227, 128 S. W. 797; Danforth v. Foster, 158 Mo. App. 94, 139 S. W. 520; Rood v. Crocus Hill Mining Co., 157 Mo. App. l. c. 410, 139 S. W. 222; Wyrick v. Wyrick, 162 Mo. App. 723, 145 S. W. 144.]

The defendants filed their account for a mechanic's lien on December 12, 1908, claiming a balance on their account of two thousand and fifty-eight and fifty-five one-hundredths dollars, and included the item of account against the Good Shepherd Mining Company from May the sixth to July the thirty-first, three thousand one hundred and two and sixty-five one-hundredths dollars, being the amount which was to be wiped out and satisfied according to their agreement with the plaintiff. This account showed that on August the tenth it was credited with cash in the sum of one thousand four hundred sixty-four and fifty-nine one-hundredths dollars, there being a discrepancy

Digitized by Google

between the amount credited and the fifteen hundred dollars of thirty-five and forty-one one-hundredths dollars, leaving the sum of one thousand six hundred thirty-seven and six one-hundredths dollars of the total amount due July the thirty-first, not credited. The statement of Mr. Davis in regard to this discrepancy was, in substance, that the fifteen hundred dollars was paid by the check of the Center Creek Mining Company and accepted on the tenth day of August and that it was credited as of that date on the journal of the defendant company, but the lien account showed a discrepancy of thirty-five and forty-one one-hundredths dollars and that the credit should have been for this check for fifteen hundred dollars but through some mistake the difference was credited on another account. A judgment was rendered in favor of defendants foreclosing their lien against the Good Shepherd Mining Company who alone was made defendant in the action and served by publication. The judgment enforced a mechanic's lien against a complete concentrating plant and buildings and an acre of ground upon which the same were situated, the judgment further reciting that upon the acre of ground the Good Shepherd Mining Company owned a mining lease and license from the Center Creek Mining Company for mining purposes.

The defendant partnership had the right to waive, discharge, release, or satisfy their mechanic's lien, and after having for a consideration waived it and agreed that as against the plaintiff in this action their account should be satisfied and plaintiff's mortgage should become a first lien on the concentrating plant and property, they could not afterwards revive such lien. Any agreement or stipulation of theirs which clearly showed that it was their intention to waive or satisfy the lien or the account on which it was based is sufficient to accomplish that purpose. [27 Cyc. 263.]

Digitized by Google

Under the evidence the appellants furnished the Good Shepherd Mining Company a statement to be used to obtain a loan on the concentrating plant and improvements. This statement was to be shown to the parties who were to make the loan. It showed that the entire debt at that time due the defendant partnership was twenty-five hundred dollars. To procure the loan, this statement was shown to the respondent. Subsequently the appellants agreed with respondent that if the latter would make a loan of eight thousand five hundred dollars, fifteen hundred dollars of which was to be received in cash, they would accept two notes of the Good Shepherd Mining Company for five hundred dollars each in full payment and discharge of their lien claim against the improvements so that the respondent could be secured by a first mortgage on the improvements on the leased premises. Relying on this, respondent made the loan, took the security, and appellants received the fifteen hundred dollars in cash and the two notes for five hundred dollars each with the understanding that it was to wipe out and satisfy fully, so far as respondent was concerned, their lien. Notwithstanding this agreement, appellants subsequently filed an account including items released from lien and obtained judgment enforcing a mechanic's lien on the leased property.

The law granting liens to mechanics and material men requires that they shall file a just and true account of the demands due them after all just credits have been given. [Section 8217, Revised Statutes 1909.] The account is the foundation of the suit. The necessity of filing this account and of its being correct and that all credits should be allowed is apparent, especially when the property-holder is concerned, the proceeding being strictly in *invitum* and the property-holder not being a necessary party to the valid enforcement of the lien, the material man thus subjecting the owner's property to an encumbrance or burden, and

Digitized by Google

that without any contract with him. The enforcement of a mechanic's lien is therefore a special and extraordinary remedy or privilege given by the law, and it is a well established principle that one attempting to avail himself of the advantages of such a lien must fully comply with the provisions of the law conferring it. The requirement of the statute that the lien claimant should file a just and true account is an element essential to securing the lien and is as much a matter of substance as any other requirement of the law, and unless the credits are given in compliance with the statute a party cannot enforce his lien upon the property of the owner of the buildings. [Hoffman v. Walton, 36 Mo. 613.] The rights of the lienor, however, are not lost where he unintentionally fails to enter in his account the full amount of the credits to which his debtor is entitled. In the present case, the defendants having included in their lien claim against the Good Shepherd Mining Company some sixteen hundred dollars of items that by their agreement were satisfied and discharged, their account was not just and true and did not contain the credits within the meaning and true intent of the lien statutes and they knowingly and intentionally failed to comply with the substantial requirement of the statute as to a true account and defendants' lien was destroyed by their intentional failure to file the statement as required by the law. [Dougherty & Moss Lumber Co. v. Rothbaum, 156 Mo. App. 215, 137 S. W. 83; Section 8223, Revised Statutes 1909.]

The chattel mortgage taken by the plaintiff to secure its loan of eight thousand five hundred dollars was defectively acknowledged in that the certificate of acknowledgment failed to state that A. L. Shepard, the president of the Good Shepherd Mining Company, signed and sealed the said instrument in behalf of the said corporation by authority of its board of trustees or directors as required by section 2799, Revised Stat-

Digitized by Google

utes 1909. Under these circumstances, said chattel mortgage was invalid as to any other person than the parties thereto until possession of the mortgaged property was delivered to the mortgagee, the plaintiff in this case. But after the said mortgage had become due by its terms the property was advertised, a sale was had, and the purchase of the mortgaged property was made by the plaintiff and possession taken under it. Whatever legal frailty there might have been in the chattel mortgage was cured by the mortgagee's taking actual possession. [Landis v. McDonald, 88 Mo. App. l. c. 339; Hardy v. Graham, 63 Mo. App. 40.] In such case the mortgage could not be legally questioned until the creditor clothes himself with a judgment and execution or some legal process against his debtor's property. Creditors cannot interfere with property of their debtor without process. [Landis v. McDonald, supra, l. c. 341.] As to the defendants' lien account for materials furnished prior to July 31, 1908, it being satisfied by agreement, the defendants would be estopped from setting up any rights in the mortgagee's property after it had passed into the possession of the plaintiff. As to the items of their lien account subsequent to July 31, 1908, amounting to some three hundred dollars, such items were contained in defendants' mechanic's lien in which they did not give the proper credits, and therefore, under the law, they lost all right to enforce a lien as to them, they being incorporated with illegal items.

The concentrating plant, as between landlord and tenant, was personal property and subject to removal by the tenant during his tenancy, but the plaintiff in this case having by agreement with the Good Shepherd Mining Company taken possession of the leased premises and the erections thereon, such erections became an integral part of the real estate to which they were affixed; being incorporated with the realty, they became by operation of law a part of the freehold and

Digitized by Google

would follow its ownership as fully as if they had been constructed by the plaintiff in the first instance and placed there prior to the letting of the property. [Lacey v. Giboney, 36 Mo. 320; Robinson v. Campbell, 8 Mo. 365; Williams v. Lane, 62 Mo. App. l. c. 68.]

The lien claimed by the defendants covered leasehold property and the erections thereon and in case of sale of the property upon which the lien was declared under the defendants' judgment the purchaser of the improvements would have been authorized at any time within sixty days to have entered upon the plaintiff's premises and removed the buildings and improvements. [Section 8216, Revised Statutes 1909.] The facts showing the invalidity of the lien upon which the respondent based its rights were outside of the record and rested in parol and the defects in the lien could only be shown by extrinsic evidence. On the face of the defendants' judgment on the mechanic's lien defendants had a valid lien claim on the acre of ground leased and upon the erections thereon, while in fact they had no lien whatever by reason of their failure to comply with the lien law. Equity exercises jurisdiction to protect real property and remove a cloud that will be likely to injuriously affect the market value of the real estate or seriously embarrass the owner by preventing, affecting or impeding the free sale or disposal of his title or interest in the property. The rule applicable to such cases is that equity will interpose where the pretended title which constitutes an alleged cloud or the proceeding which it is apprehended will create one is apparently valid on its face and the party in possession will be compelled to resort to extrinsic evidence to show the invalidity of the pretended title and to defend his own. [6 Am. and Eng. Ency. Law, 153.] In the case of Merchants' Bank v. Evans, 51 Mo. 335, 345, it is said that the weight of authority and reason sustains the position that if the defect is such as to require legal

Digitized by Google

acumen to discover it, whether it appears on the deed or proceedings, or is to be proven *aliunde,* courts of equity will entertain jurisdiction to remove the cloud. [See, also, Bank of Tipton v. Davidson, 40 Mo. App. 421, 425; Gardner v. Terry, 99 Mo. 523, 12 S. W. 888; State ex rel. Bayha v. Phillips, 97 Mo. 331, 339, 10 S. W. 855; Verdin v. City of St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52.]

It is said in this case by appellant that respondent has an adequate remedy at law. Whether a legal defense could be interposed we need not consider. The appellants are threatening a levy upon and sale of respondent's property under circumstances which justifies the exercise of the preventive jurisdiction of equity to avoid the casting of a cloud on respondent's title. No prudent purchaser would take the property with a mechanic's lien judgment against it and respondent consequently had the right to invoke the aid of a court of equity to protect it.

The defendants herein in their suit against the Good Shepherd Mining Company to enforce their mechanic's lien might have made the present plaintiff a party thereto, it being interested in the property charged with the mechanic's lien, but not having done so, the plaintiff is not bound by such proceedings. [Section 8221, Revised Statutes 1909; Hauser v. Hoffman, 32 Mo. 334; Womach v. City of St. Joseph, 201 Mo. 467, 100 S. W. 443.]

The appellants in this case will not be permitted to enforce their mechanic's lien against the improvements which have become a part of respondent's realty after having furnished despondent with their statement and agreeing that if respondent would make a loan, a part of which was to satisfy appellants' claim, appellants would accept two promissory notes in addition to the cash payment in full satisfaction of the claim against the property and in full satisfaction



Digitized by Google

of the indebtedness of the Good Shepherd Mining Company; and whatever other agreement appellants had with the Good Shepherd Mining Company but not brought to respondent's attention is not binding on it. We think to allow the appellants to gain the benefit of what they had released by their contract and to destroy the respondent's security for its loan which appellants agreed they should have, would be a virtual or constructive fraud, although no actual fraud was intended, which a court of equity will not tolerate.

For the reasons herein appearing, the judgment is affirmed. All concur.

---

## A. G. HEGBERG, Administrator, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

**Springfield Court of Appeals, May 6, 1912.**

1. **RAILROADS: Escaping Cars: Negligence: Contributory Negligence: Jury Question.** In an action against a railroad company by an administrator for damages for the alleged negligent killing of his intestate, who at the time of his death was a brakeman on a freight train, engaged in switching cars and who was killed on account of a collision caused by freight cars escaping from a side track because they had not been properly blocked and the brakes set; the evidence is examined and *held* that the question of defendant's negligence and deceased's contributory negligence were for the jury and that the court properly overruled defendant's demurrer to the testimony.

2. **MASTER AND SERVANT: Safe Place to Work: Continuous Duty.** The duty of the master to furnish the servant a reasonably safe place in which to work is not discharged by furnishing such place at the beginning of the servant's work, but the master is required to use ordinary care to see that the place continues in a reasonably safe condition, the duty being a continuous one and non-delegable.

Digitized by Google

3. **RAILROADS: Escaping Cars: Blocking Cars: Master and Servant: Duty of Master.** A railroad company owes the duty to its servants employed in the handling of trains to use reasonable care to have its cars left on a side track properly blocked and braked, so as to prevent said cars from escaping.

4. ———: ———: ———: ———: ———: **Presumption: Res Ipsa Loquitur.** Where cars left on a side track get loose and injure a servant in the due performance of his duty, the presumption will be raised that the master did not use reasonable care to hold the cars on the side track and the burden would be upon the master to prove that he performed his duty in this respect.

5. **APPEAL AND ERROR: Evidence: Preserving Diagram in Record.** Where a witness was examined with a map or diagram of the scene of the accident, but the appellant did not preserve such map or diagram in the record presented to the appellate court and the testimony standing alone is unintelligible, the appellant will not be permitted to draw unfavorable inferences from such testimony.

6. **PRACTICE: Demurrer to Evidence: Jury Question.** In considering a demurrer to the evidence, where the evidence is susceptible to two inferences, one consistent with ordinary care and the other tending to show negligence, the question is one of fact for the jury.

7. ———: ———. A demurrer to the evidence admits every fact of plaintiff's case to be true which the evidence tends to prove.

8. **BURDEN OF PROOF: Prima Facie Case: Oral Testimony: Jury Question.** Where the plaintiff has the burden of proof and has made out a prima facie case by oral evidence and though plaintiff's witnesses are uncontradicted and defendant offers no evidence at all, the court has no right to direct a verdict but the defendant is entitled to have the jury pass on the credibility of the witnesses. This rule is applied in a case where defendant contended that the oral evidence established the contributory negligence of plaintiff.

9. **RAILROADS: Escaping Cars: Contributory Negligence: Servant Selecting Dangerous Method: Violating Rules of Company.** Plaintiff's decedent was killed on account of cars escaping from a side track and colliding with an engine. The deceased, who was a brakeman and was assisting in uncoupling and switching cars, had jumped on the pilot of the engine at the time of the accident. Defendant contended that deceased was guilty of contributory negligence in having failed to block and brake the cars that escaped, in selecting a dangerous method of uncoupling the cars and in violating the rules of the company

Digitized by Google

by jumping on the pilot of the engine. *Held*, under the evidence that plaintiff's contributory negligence was for the jury and that the instructions given on that question correctly declared the law.

10. **RAILROADS: Master and Servant: Violating Rules: Tacit Consent of Officers: Contributory Negligence.** Although a railroad company had posted rules forbidding the uncoupling of cars by getting on the pilot or between the cars while the uncoupling took place, if the company's officers knew of the violation of the rule and with their tacit consent have allowed the same to be habitually violated, an employee in pursuing the usual method of uncoupling the cars would not be guilty of contributory negligence as a matter of law.

11. **DEATH BY WRONGFUL ACT: Compensatory Damages: Evidence: Parents' Loss of Son.** In an action by an administrator for the wrongful death of his decedent, a single man, who was killed by the cars while employed as a brakeman for defendant, it was *held* competent for the father to testify as to the earnings of the deceased and the amount of money he had furnished his parents during his lifetime and their dependence upon his earnings for support, following the holding of the Supreme Court in Boyd v. Railroad, 139 S. W. 561.

12. **EVIDENCE: Objections: Practice.** A party objecting to testimony is not required to keep up a running fire of objections throughout the entire examination. In this case the defendant's objections are *held* to have been sufficiently well timed and numerous enough to meet all the requirements of the law.

13. **DEATH BY WRONGFUL ACT: Statutory Actions: Action Based on Particular Statute.** In an action under the damage act for the wrongful death of a party resulting from the negligence of the peculiar character specified in section 5425, Revised Statutes 1909, the aggrieved plaintiff must sue under that section and does not have the option of suing under sections 5426 and 5427. These are purely statutory rights and must rest each upon its own statute.

14. ———: ———: ———: **Railroads.** If the servants and agents of defendant railroad company killed the deceased under circumstances such as to create a liability under section 5425, Revised Statutes 1909, necessarily defendant is not liable for such killing under any other sections; contra, if the servants and agents of the defendant killed the deceased under circumstances making defendant liable under any other section of the statute than 5425, such defendant is necessarily not liable under such section.

15. ———: ———: ———: **Pleading.** In an action under the damage act for the wrongful death of a party, resulting from

Digitized by Google

defendant's negligence, it is not necessary for the pleader to designate under which of the sections his action is brought, nor would such designation, if made, be conclusive as to which section the liability would be based upon.

16. ———: ———: ———: ———. In an action by an administrator for the wrongful death of his decedent, a brakeman, alleged to have been caused through defendant's negligence, the plaintiff contended that his petition was drawn under sections 5426 and 5427, Revised Statutes 1909. His evidence was given, the instructions drawn and the trial conducted on that theory. The defendant contended that the suit is prosecuted under section 5425, Revised Statutes 1909. *Held*, that plaintiff's cause of action was in fact for a liability under section 5425 and that the petition stated the necessary constituent facts in such a case as to apprise defendant that plaintiff was prosecuting under section 5425.

17. ———: ———: ———: **Death from Operating Train: Time of Negligent Act.** The general purpose of section 5425, Revised Statutes 1909, is to allow damages for wrongful death, resulting from the negligent acts of servants or employees engaged in running, conducting or managing public conveyances, controlled mostly by common carriers; it requires that the negligence of defendant's employees must have concurred in point of time with the movement or operation of its cars, but not that the negligence must have occurred in point of time with the infliction of the injuries caused the death.

18. **NEGLIGENCE: Time of Negligent Act: Proximate Cause.** Under the general rule of actionable negligence while the injuries may not immediately follow the negligent act, it must appear that the injuries were the natural and proximate consequence of the negligence and might and ought to have been foreseen by a reasonably prudent man in the light of all the attendant circumstances.

19. **DEATH BY WRONGFUL ACT: Suit by Administrator: Action Not for Benefit of Estate.** An administrator prosecuting an action under section 5425, Revised Statutes 1909, for the wrongful death of his decedent, cannot sue for the benefit of the estate, there being no such statutory provision, but he sues as the personal representative of the distributees who would be entitled to the decedent's real and personal property under the laws of descent and distribution.

20. **STATUTORY CONSTRUCTION: Giving Effect to Every Word.** A familiar canon of statutory construction is that every word of the statute, where it can be consistently done, is to be given force and effect, especially if they are in harmony with the legislature's intention as collected from the entire act.

Digitized by Google

21. **DEATH BY WRONGFUL ACT: Compensatory Damages: Rule for Estimating Damages.** In estimating the amount of compensatory damages, if any are allowed under section 5425, Revised Statutes 1909, it would seem proper to apply the rule given by section 5427, that is, that such an amount shall be allowed as the jury may deem fair and just with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue.

22. ———: ———: ———. The beneficiaries provided for by the fourth clause of section 5425 are not generally dependent upon the deceased and it is only in those cases where they have in fact been receiving pecuniary assistance and then only to the extent of a fair and just estimate of their loss that they could recover compensatory damages under said section.

23. ———: ———: **Distribution of Amount Recovered.** In an action under section 5425, Revised Statutes 1909, for the wrongful death of plaintiff's decedent, the beneficiaries were those provided for by the fourth clause of said section. *Held*, that the amount recovered would go to the father, mother, brothers and sisters of the deceased and their descendents in equal parts, although the father and mother were the only ones who suffered pecuniary loss.

24. **INSTRUCTIONS: Negligence: Contributory Negligence.** In an action by an administrator to recover damages for the wrongful death of his decedent, who was killed by a collision resulting from the escape of cars that had been stored on a side track, and which were not properly blocked and braked, an instruction is criticised because it confined the duty of fastening the cars to the day of the accident and it further failed to require a finding of negligence of the agents, servants and employees of the defendant, other than the deceased.

25. ———: **Must be Intelligible.** It is important that instructions to the jury should be intelligible and couched in plain and unequivocal language so as to be readily understood by them.

26. **WORDS AND PHRASES: Unmarried: Pleading.** An allegation in a pleading that a person is single and unmarried does not necessarily mean that such person was never married, but ordinarily and especially after verdict the word "unmarried" would properly be *held* to mean that the party had never been married.

27. **DEATH BY WRONGFUL ACT: Action by Administrator: Pleading: Allegation Concerning Children.** In an action under section 5425, Revised Statutes 1909, to recover for the wrongful death of plaintiff's decedent, an allegation that deceased was single and unmarried would be a sufficient allegation that he

Digitized by Google

left no natural children, but not a sufficient statement from which it would naturally be inferred that he did not leave surviving him an adopted child or children.

28. **PARENT AND CHILD: Adopted Children: May be Adopted by Unmarried Person.** The general law is that where the statute does not make any restrictions, an unmarried person may legally adopt a child.

29. **DEATH BY WRONGFUL ACT: Pleading.** In statutory actions to recover for the wrongful death of a person the party suing must bring himself strictly within the statutory requirements necessary to confer the right and they must appear in his petition, otherwise it shows no cause of action.

30. **PLEADING: Failure to State Cause of Action: Always Open to Review.** A petition that does not state a cause of action is always open for review at every stage of the case, at any time, in any court, whether raised by demurrer or not.

31. **APPEAL AND ERROR: Reviewing Record.** Section 2083, Revised Statutes 1909, has made it the duty of the appellate court, independent of any action of the attorneys, to examine the record and if any error is apparent on the face of the record to reverse the judgment *sua sponti*, whether any exceptions are taken or not.

32. **VERDICT: Excessive: Death by Wrongful Act.** In an action by an administrator to recover damages for the wrongful death of plaintiff's decedent, COX, J., in a separate opinion concurs in reversing and remanding the cause, but places his concurrence upon the ground that since the measure of damages that went to the jury was compensatory alone, the verdict of $7500 was excessive. It appeared that the mother and father of deceased were the only relatives who suffered pecuniary loss from the death.

32 **RAILROADS: Escaping Cars: Contributory Negligence: Instructions.** In an action for damages on account of the death of plaintiff's decedent, which resulted from a collision caused by the escape of cars stored on a side track, which had not been properly braked and blocked, *held*, in separate opinion by COX, J., concurred in by GRAY, J., that on the question of contributory negligence the jury should be instructed that if they should find from the evidence that it was the duty of the deceased to see that the cars left standing on the switch had sufficient breaks set to hold them in place while the switching was done and he failed to perform that duty, then plaintiff could not recover.

Digitized by Google

Appeal from Polk Circuit Court.—*Hon. C. H. Skinker,* Judge.

REVERSED AND REMANDED.

*W. F. Evans* and *John H. Lucas* for appellant.

(1) The evidence is insufficient to convict the appellant of the error assigned. 3 Elliot on Railroads (2 Ed.), sec. 1296, p. 720; Furber v. Bolt & Nut Co., 185 Mo. 301; Conovski v. Transit Co., 207 Mo. 263; Willikin v. Com. Co., 202 Mo. 637; Kennedy v. Railroad, 128 Mo. App. 297. (2) The evidence convicts the respondent of contributory negligence so as to preclude a recovery herein. Moore v. Railroad, 146 Mo. 582; 1 Bailey on Personal Injuries, sec. 1121; Brady v. Railroad, 206 Mo. 531; Pierson v. Railroad, 127 Iowa 13; Montgomery v. Railroad, 109 Mo. App. 88; Matthews v. Railroad, 227 Mo. 250; Neel v. Ryus, 130 S. W. 78; Railroad v. Kane, 118 Fed. 223; Rail road v. Caraway, 77 Ark. 405; Railroad v. Meyers, 95 Ill. App. 578; Fluhrer v. Railroad, 121 Mich. 212; Railroad v. Duwees, 153 Fed. 56; Van Camp v. Wabash, 141 Mo. App. 344. (3) The court erred in admitting incompetent evidence, viz: that of A. C. Hegberg, father of the deceased. Barker v. Railroad, 91 Mo. 91; Tetherow v. Railroad, 98 Mo. 84. (4) The court erred in giving instructions of its own motion herein and instructions on behalf of respondent, the same being erroneous, misleading, unsupported by evidence and calculated to confuse the jury. Instruction No. 2 enlarges the issues. Roscoe v. Railroad, 202 Mo. 587; Gibler v. Railroad, 148 Mo. App. 487; Gibson v. Bridge Co., 112 Mo. App. 594; Tinkle v. Railroad, 110 S. W. 1094; Wellmeyer v. Transit Co., 198 Mo. 544; Manser v. Botts, 80 Mo. 651. Is misleading: Belt v. Goode, 31 Mo. 130; Clark v. Kitchen, 52 Mo. 316; Waddington v. Hullett, 92 Mo. 535.

Digitized by Google

*Rechow & Pufahl, Hamlin & Seawell* for respondent.

(1) There was no error in overruling the demurrer and refusing the peremptory instruction. Smith v. Fordyce, 190 Mo. 1; Edge v. Railroad, 206 Mo. 471; Trust Co. v. Railroad, 87 Fed. 133; Au v. Railroad, 29 Fed. 72; 4 Thompson on Negligence (2 Ed.), secs. 4525, 4742; Railroad v. Johnson, 24 Tex. Civ. App. 180, 58 S. W. 622; Jones v. Railroad, 178 Mo. 528; Koenner v. Car Co., 209 Mo. 157; Browning v. Railroad, 124 Mo. 55. (2) The court did not err in refusing to declare deceased guilty of contributory negligence as a matter of law, nor was there any assumption of risk. Kennedy v. Railroad, 190 Mo. 442; Trust Co. v. Railroad, 87 Fed. 134; Brady v. Railroad, 205 Mo. 510; Francis v. Railroad, 127 Mo. 658; Barry v. Railroad, 98 Mo. 62; Hunter v. Railroad, 149 Mo. App. 243; Heine v. Railroad, 144 Mo. App. 443; Hamilton v. Coal Co., 118 Mo. 364; Eddington v. Railroad, 204 Mo. 61; Burdict v. Railroad. 123 Mo. 222; Murphy v. Railroad, 115 Mo. 111; Brannock v. Railroad, 147 Mo. App. 301; McGuire v. Railroad, 128 Mo. App. 677. (3) There was no error in the reception of evidence. Boyd v. Railroad, 236 Mo. 54, 139 S. W. 561; Williams v. Railroad, 141 Mo. App. 631; Philpott v. Railroad, 85 Mo. 164; King v. Railroad, 98 Mo. App. 235; Marsh v. Railroad, 104 Mo. App. 577; McKenzie v. Railroad, 216 Mo. 17; Schlereth v. Railroad, 115 Mo. 102; 4 Suth. Dam., sec. 1273, p. 3741; Johnson v. Railroad, 150 Mo. App. 322. (4) The instructions were squarely within the issues presented by the pleadings and evidence. Chouquette v. Railroad, 152 Mo. 263; Clowers v. Railroad, 21 Mo. App. 213; Smith v. Fordyce, 190 Mo. 213; Dutro v. Railroad, 111 Mo. App. 259; McDermott v. Railroad, 87 Mo. 286; Robinson v. Railroad, 133 Mo. App. 101; Browning v. Railroad, 124 Mo. 55; Boyd v. Railroad, 139 S. W. 570; John-

Digitized by Google

ston v. Railroad, 150 Mo. App. 322; Murphy v. Railroad, 228 Mo. 86; McKenzie v. Railroad, 216 Mo. 14; McCarty v. Railroad, 192 Mo. 400; Lee v. Railroad, 195 Mo. 428; Tetherow v. Railroad, 98 Mo. 86.

NIXON, P. J.—This is an action by the administrator of the estate of John Hegberg, deceased, for damages for the alleged negligent killing of his intestate (who was his brother). The deceased was in the employ of the defendant company as a brakeman on one of its freight trains and was killed in a collision which occurred at Willow Springs, Missouri, on the 12th day of July, 1910. This action is maintained to recover damages for the wrongful killing of the deceased under chapter 38 of the Revised Statutes of 1909 concerning damages in actions for torts. A trial was had in the circuit court of Polk county which resulted in a judgment for the plaintiff in the sum of $7500. The defendant has appealed.

The petition contains four counts. The second, third and fourth counts were eliminated as grounds of recovery by the instructions of the trial court and it is therefore unnecessary to set them forth in this opinion.

The first count of the petition (the one on which the trial was had) is as follows (formal parts omitted):

"The plaintiff for cause of action states that on the 27th day of August, 1910, he was by the probate court of Greene county, Missouri, duly appointed administrator of the estate of John Hegberg, deceased, and that he qualified as such and is now the duly and legally qualified and acting administrator of the estate of John Hegberg, deceased.

"That the defendant, St. Louis & San Francisco Railroad Company, is and was on the date hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the state of Mis-

Digitized by Google

souri, and owning and operating a railroad in said state and particularly through and into the counties of Wright and Webster of said state.

"That on the 12th day of July, 1910, the said John Hegberg was in the employment of the defendant as a brakeman, on one of its freight trains running from Springfield to Thayer, Missouri. That upon the arrival of said freight train at Willow Springs, Missouri, the said John Hegberg, together with the other members of the said train crew were ordered to make up a train at said place and run the same to Springfield, Missouri.

"That at said place in addition to the main track there is a side track and at said time there were six loaded and unloaded cars standing on the side tracks west of the main line track. That in making up said train for Springfield it was necessary to place a car from said side track onto the main line and in performing this work on account of the position of the car desired on the side track it was necessary to couple three of said cars to the engine and convey them to a switch south of the station house and kick the car desired onto the main track and the remaining cars, not desired for said train, would be run over the switch and kicked back on the side track.

"Plaintiff says that said side track west of the main line track upon which said loaded and unloaded cars were standing had a downward grade south and toward the switchstand and that it was the duty of the defendant and its agents, servants and employees who placed said cars on said track to see that the brakes on each of said cars were securely set and to securely set the brakes thereon and if there were any of the brakes that could not be so set to securely block the cars and each of them so that said cars nor any of them could break loose and escape and that it was the duty of the defendant and its conductor who was in charge of the train that was being made up after

Digitized by Google

certain cars were released or taken away to see that the brakes with the remaining cars were still securely set and if any of the brakes were not in good condition to see that such car or cars were securely blocked or otherwise fastened so that they could not break loose and escape and run over the side track south to the switch stand aforesaid:

"Plaintiff says that the defendant, its agents, servants, and employees disregarded their duty in this behalf and that prior to the injury to the deceased, six freight cars had been placed on the side track aforesaid and that the defendant, its agents, servants and employees negligently and carelessly failed to see that said cars were securely fastened and negligently and carelessly failed to securely fasten said cars and each of them negligently and carelessly failed to set the brakes on said cars and each of them and negligently and carelessly failed to securely block said cars and each of them and that the defendant and its conductor in charge of the train that was being made up as aforesaid and after certain cars were released to be taken away negligently and carelessly failed to see that the brakes on the remaining cars and each of them were still securely set and negligently and carelessly failed to see that said remaining cars and each of them were securely blocked or otherwise fastened so that they would be reasonably safe and not break loose and escape and run over the side track south to the switchstand aforesaid.

"Plaintiff says that after the cars aforesaid had been released the three remaining cars on said side track were not securely fastened nor securely blocked and that by reason thereof said side tracks with the remaining loaded cars thereon became unsafe and dangerous and said cars were likely to escape and run down southward to the switchstand and injure the employees of the defendant engaged at work at said place.

Digitized by Google

"Plaintiff says that in making up said train the deceased, John Hegberg, was ordered by the defendant, its agents and employees and it was his duty to assist in kicking cars onto the main line and back to the side track aforesaid and that while he was in the discharge of his duties and attempting to uncouple cars from the engine to be kicked back on the side-track the three loaded cars aforesaid on said side track through the negligence and carelessness of the defendant, its agents, servants and employees in the manner aforesaid escaped from their position and ran south on said track and collided with the cars at said switch and the said John Hegberg without fault or negligence on his part was crushed, mangled and killed.

"That at the time of his death he was single and unmarried and over the age of twenty-one years and that plaintiff by reason of the death of the said John Hegberg, aforesaid, through the negligence and carelessness of the defendant as aforesaid, has been damaged in the sum of ten thousand dollars for which amount he prays judgment."

The answer generally denies negligence, alleges contributory negligence, and pleads assumption of risk.

The following admissions of facts were made:

(1) The deceased was ordered to make up a train at Willow Springs for Springfield. (2) In addition to the main track at Willow Springs, there was a side track on which there were at the time in question six cars, some loaded and some unloaded. It was necessary to take a car from the side track to the main line, and in so doing it was necessary to couple three of the cars to the engine and convey them to a switch south of the station house, and kick the car desired onto the main track, and the remaining two cars, not desired, run over the switch and kicked back on the side track to their original position. (3) The side track had a downward grade south toward the switchstand.

Digitized by Google

The plaintiff's petition in substance charges that six of defendant's freight cars, part of which were loaded, were left standing on its side track at Willow Springs; that the side track at that place had a downward grade south toward the switch where deceased as an employee was required to perform his work; that a duty rested upon the defendant and its employees, when said cars were stored on the side track, to fasten and secure each of them so that they could not escape and roll down toward the switchstand, thereby rendering the place where the deceased and other employees were required to work insecure; that this duty was not performed and that the failure to so perform it caused the injury. The second ground of negligence charged is that it was the duty of the defendant and its conductor when picking up any of the cars stored on the side track at this place, when a train was being made up, to see that the remaining cars were properly secured by setting the brakes or by blocking the wheels so that when any cars were taken away those remaining could not escape, run down the side track, and injure defendant's employees.

Defendant contends, on the other hand, that at the time the cars were set out at Willow Springs on the side track, the only duty required of the company was to have enough of the hand brakes set to keep the string of cars from being blown out by the wind; and that when at any time subsequently any one or more of the several cars were to be released and taken away, in making up a train, and others left standing, it was the duty of its brakeman in charge of uncoupling the cars, before cutting any of the cars loose, to see that the remaining cars were secured by setting the brakes or blocking the wheels; that on the particular occasion of intestate's death he was the brakeman who uncoupled the three cars and failed to discharge his duty as brakeman by setting the brakes on the remaining

Digitized by Google

cars, and that such negligence contributed to cause his death.

The action of the trial court in overruling the defendant's demurrer offered at the close of all the evidence in the case presents the first important question for our consideration. The defendant having put in its evidence after its demurrer to plaintiff's evidence was overruled, the validity of the demurrer filed at the close of all the evidence is to be determined by all the evidence in the case.

The facts concerning the physical condition of defendant's side track whereon its cars were stored at Willow Springs were undisputed. The side track sloped to the switch, some six or seven hundred feet south, and when a string of cars were stored on it, unless the brakes were properly set or the wheels blocked, the cars were likely to escape and roll down grade south to the switchstand, and hence greater caution would be required in securing them in such a place than if they were placed on a level track. It is conceded that by reason of not being properly secured, three cars escaped from their position, rolled south on said side track, and collided with the cars on which deceased was at work, resulting in his death.

The law requires that the master use ordinary care to furnish his employee with a reasonably safe place in which to work, having regard to the danger of the service and the peril to which the employee will be exposed from failure to exercise such care; and this duty is not discharged by furnishing his servant a reasonably safe place at the beginning of the servant's work, but defendant is required to use ordinary care to see that the place is left in a reasonably safe condition, the duty being a continuing one and non-delegable. Besides this, an ordinarily prudent master in charge of the management of a railroad, would have known that in the ordinary transaction of the railroad business, cars were only stored

Digitized by Google

on the side track at Willow Springs temporarily, and that in the exigencies of the business, one or more of them were likely to be required to be cut loose from the others and put into use on the main line. It was further apparent that defendant, as a reasonably prudent master, should have anticipated that its servants in the discharge of their ordinary duties in the handling of freight cars would be employed in releasing and removing those cars between the place where said cars were stored and the switchstand, and that when any one or more of the string of six cars should be removed, if the brakes were not set or the wheels blocked on the remaining cars, they would be likely to roll out toward the main track, causing a collision. The evidence is uncontradicted that the stock car was the only one of the six cars that was either braked or blocked. This stock car was one of the three cars removed and taken to the switch, and when it was removed, the other three cars loaded with coal and weighing some 210 tons were left on the side track without anything to hold them in place. The deceased at the time of his death was at a place where he had a right to be and in the discharge of his ordinary duties as brakeman.

The plaintiff offered the following testimony as to the duty and custom of the defendant at Willow Springs as to securely fastening the cars set out on the side track at the time they were set out, for the purpose of showing that when any of them were subsequently cut loose the brakeman engaged in that service would not be required to see that the remaining cars had brakes set or were otherwise secured by blocking: (From testimony of C. O. Hegberg.) "Q. Now, Mr. Hegberg, examine this book which I hand you and state what it is or what it contains? A. That is a book of the rules of the Frisco Railroad Company. Q. State whether or not you have engaged (at Willow Springs) in the switching of cars and in the plac-

Digitized by Google

ing of cars from the side track to the main track in switching cars? A. Yes, sir; I have. Q. Describe the side track there and its grade? A. It is down grade there where you set out cars. Q. Down grade in what direction? A. Down grade to the south. Q. Go on? A. If I should go there I should see that the brakes were set on the cars as they were set out. Q. Are there any special instructions about that at that place? A. Yes, sir; there are; there are instructions to set brakes on all cars set out; that is a rule in the book of rules."

The rules referred to are as follows:

"438. Cars left at stations must have sufficient hand brakes set to prevent any possibility of their being blown out. The air-brakes must be released and not be depended upon to hold cars left at stations. All cars left at non-agent sidings must be coupled-up when practicable. In cases of single cars, or one with defective brakes, wheels should be securely blocked in addition to having hand-brakes set. Conductors setting out or picking up cars must see that cars which are at the farther end of side tracks clear and that brakes are still applied."

"504. Agents must not allow cars to stand on main or passing track for loading or any other purpose without special permission from the superintendent or train master in each case. He must know that cars on siding properly clear main track, that brakes are applied and wheels blocked when necessary, to prevent the possibility of their being moved by the wind, and that all standing cars are out of the way for passing trains at night. They must also see that doors of covered cars are closed."

The same witness, being recalled in rebuttal, testified in part as follows: "By the court: Q. Now when there are several cars on the side track, such as have been described in this case, and it is desired



Digitized by Google

to take out a part of them and leave a part of them in there, and a brakeman comes up and cuts some of them loose from the others, do you know whether it is proper and usual and customary for that brakeman to see whether the cars which are being left standing upon the side track have sufficient brakes set to hold them in there, and does he do that before the uncoupling is done? A. The man that sets the cars out there does that; he is supposed to set the brakes on those cars. Q. At what time does he do that? A. He is supposed to do that when he sets the cars out there. The man that set the cars out before that is supposed to set the brakes on the cars. Q. Suppose there are half a dozen cars set out on the side track, as in this case, and it is only necessary to have one or two brakes set at the south end, or sufficient brakes to hold them in, now if a brakeman comes there to get out two or three cars, should he see about the brakes on the cars which are left in there before he uncouples the cars to take them out? A. When they kick the cars back there then they should brake enough so they won't roll out. Q. If, as in this case, the track is sloping to the south, and the brakes are set on the cars which he is taking out, and he is leaving for the time being cars which are supposed to be left upon the side track and they are insecure, would it be customary in so doing that he should see that brakes are set on the cars which are left, before the other cars are uncoupled? A. He would naturally think the brakes were set upon those cars that are to be left. Q. On all of them? A. Yes, sir. If I go to Willow Springs and set out a car, I would set the brake on it. Q. Suppose you set out six or ten cars? A. I would set the brakes. Q. On all of them? A. Yes, sir; so that in case another man comes in and gets a car the cars left will not roll out. If the track is sloping to the south, it would be the practice to set the brakes on each car because if he should leave some without

Digitized by Google

brakes you could go and take out several cars at the south end and that might leave the north cars without being fastened at all."

If the collision caused by the loose cars had resulted in the death of the fireman or engineer, the prima facie liability of defendant under the evidence would have been incontestable, and it would have been quite immaterial in such case which of defendant's brakeman was responsible for their escape. The fact that John Hegberg, a brakeman, was killed instead of the fireman in no way changes the legal status of the case, except decedent's failure in duty, if any, could be shown by defendant under its plea of contributory negligence.

We appropriate and apply to this case the language of our Supreme Court in the case of Jones v. Railroad, 178 Mo. 528, 545, 77 S. W. 890: "It was the duty of the master in this case to use reasonable care to prevent those cars escaping, and, therefore, when they were found running loose, so as to imperil the life of the servant who was in the due performance of his duty, the presumption is that the master did not use reasonable care to hold his cars on the side track, and the burden is on him to prove that he performed his duty in this respect; it devolves on him to explain the occurrence." [See, also, Vanderbeck v. Railroad, 154 Mo. App. 321, 133 S. W. 1178; Continental Trust Co. v. Railroad, 87 Fed. 133.] The reasoning in the Jones case goes to the vital questions involved herein. But the position of the plaintiff in this record is more strongly fortified than that of the plaintiff in the Jones case because the further fact is conceded in this case that none of the brakes on the cars that escaped were securely set nor were the wheels blocked by defendant's employees as should have been done and as its rules required.

The appellant contends with great earnestness that the facts supporting its plea of contributory neg-

Digitized by Google

ligence are in such irreconcilable conflict with the verdict of the jury as to have required a directed verdict. It therefore becomes necessary to examine the facts pertinent to that issue.

The train crew at the time of the accident consisted of F. D. Thayer, conductor, N. N. Hudson, engineer, George Slater, fireman, T. L. Livingston, head-brakeman, and deceased, John Hegberg, rear brakeman. Upon the arrival of this freight train at Willow Springs, the train crew was ordered to make up a train at said place and run the same to Springfield. In addition to the main track at Willow Springs, there is a side track, west of the main track and south of the depot, and there were six cars, four loaded and two empty, standing on the side track at the time in question. The three rear cars that were loaded with coal weighed some 210 tons. Under the orders received by the train crew, they were required to take one of the six cars from the side track to the main track in order that the train might take the same to Springfield. In performing this work, this car being the fourth car from the north or rear end of the six cars, it was necessary to couple three of said cars to the engine and uncouple them from the other three cars which were to be left, and to convey the three cars attached to the engine to the switch south of the station house, and to kick the loaded car desired onto the main track, and then to take the remaining two cars not desired for the Springfield train back to the side track to their original position beside the three cars that had not been removed. Under the admissions it will be seen that the side track upon which the six cars were standing had a downward grade toward the south and toward the switchstand. The evidence tends to show that the six cars on the side track were a distance of twenty-five to thirty car length north of the switchstand. The first of the six cars—commencing to count from the upper or north

Digitized by Google

end of the string of cars—was loaded with coal, as were also the second, third and fourth cars; the fifth was an empty stock car, with a brake on the top on the south end, and this was the only brake of the six cars that was set and it held the string of cars in place; the sixth car, or the one that the engine coupled to, was empty. The second and third cars had good brakes in good condition but they were not set. The evidence tends to show that the customary method of operating freight trains when engaged in switching at stations is for the engineer and fireman to remain in their places on the engine; that the coupling and uncoupling of cars and the releasing and setting of brakes is generally done by the brakeman, and the operation of the train, in moving or stopping it, is by signals of the brakeman to the engineer in the day time, by movements of the hand, and at night, by the movements of a lantern.

George Slater, the fireman, testified as to what took place immediately before the accident, in substance, as follows: We had orders at Willow Springs to pick up the loaded coal car, the fourth car of the six from the north end. These six cars were from twenty to twenty-five car lengths north of the switch-stand on the side track. The night was somewhat dark when the switching was done. When the engine headed in on the side track, the front part of the engine was toward the north with the tender in the rear. The engine was being moved north on the side track to be coupled to three of the cars. After we got in on the switch I saw Hegberg; he was standing on the box car, the fifth car from the rear or north end and the second car from the front or south end of the string of cars. At the time I saw him on top of this car he was letting off the brakes on top of the car. What made me think it was Hegberg was the movement of the lantern. When I saw the man I took to be Hegberg on top of the high car, he turned off the

Digitized by Google

brakes, then turned around, walked back to the rear end of the car and got off on the engineer's side and I did not see him anymore. At the time he got off, the three cars were moving out toward the switch. At the same time that he was on top of the car, I saw another lantern on the ground down the track a little nearer the switch than where the three cars were left. I did not know whether it was Livingston or not. The witness further testified on cross-examination that according to the customary mode it would be the duty of the brakeman who cut the three cars loose from the three cars that were left standing to "tie" the other cars, that is, secure them so they would not roll out; that it was his duty to get up there on the cars that were left standing and set the brakes, or block the cars, so they would not run out, and that he should perform this duty before he cuts the cars loose. He also testified, by way of impeachment of witness Livingston, as to a conversation he had with Livingston, saying he was passing along where Livingston was standing, and said to Livingston, "Who uncoupled those cars at Willow?" and that Livingston just said, "Me." That that was the word he used. This witness also testified that when they were returning the two empty cars to their places on the side track, the three cars that had been left standing there had moved down, and collided with them about two or three car lengths from the switch, that is, a little north of the switchstand.

C. O. Hegberg testified also that he was an engineer in the employ of the defendant company and a brother of the deceased; that he was familiar with the duties of brakemen on the defendant's railroad and had himself been engaged in that employment some years. He testified as an expert, in part, as follows: "Q. Now, Mr. Hegberg, if there were just two brakemen as there was in this case, and the engine should go back up where the six cars were, the man that was

Digitized by Google

on the rear end, that you call the rear brakeman, would be the man that would get upon the car and turn or unloosen the brake on the car that is to be cut loose from the other three, that would be the man according to the usual and ordinary custom who would get down and cut the cars loose, the one that let the brakes off? He would be the man that would get down and signal the engineer and cut the cars from the other three that were to be left there? A. No, sir; not the man that let the brakes off; the other man would cut the cars off on account of keeping the other one from climbing down. Q. Now, assuming that the other man was down with the engine, or at the switch? A. The other man would be on top of the cars. Q. Now then, assuming that there are the three cars here and they are all attached and assuming that there were only two brakemen, now when the engineer backs up here somebody couples him up? A. Yes, sir. Q. This one on top of the car doesn't get down to do that? A. No. Q. Now then, assuming there is one brakeman here and the other is up here on top of the cars loosening the brakes, in such an event would not he naturally get down here and uncouple this car and give the signal, if the other man was coupling out here? A. Certainly, if the other man was out there. Q. Assuming that was the position now? A. Yes, sir. Q. Assuming that one of the brakemen was out there? A. Yes, sir. Q. Then in such an event the man up on top loosening the brakes would naturally get down and make the cut and give the signal to back out or pull out, as the case may be? A. Yes."

The latter part of the testimony of this witness is claimed to be in direct conflict with the other parts. But the latter part is rendered unintelligible because of the manner of examining the witness at the trial. The expressions employed—"here," "out here," "out there"—makes it impossible to determine what places are referred to. The witness was evidently examined

Digitized by Google

with a map or diagram of the scene of the accident before him, which is not made a part of the record presented to us. We cannot hold that the witness contradicted himself when the appellant who made up the record, if it desired to have such conflict appear, did not include the map or diagram, and its failure in this respect will not authorize us to draw unfavorable inferences against the respondent's evidence.

F. D. Thayer, the conductor of the train crew that night at Willow Springs, was at another part of the switchyard at the time the accident occurred and was unable to testify as to the facts and circumstances surrounding the switching and the killing of the deceased. He was there, however, a few minutes after the accident, and he states that he found Hegberg lying on the pilot of the engine. "He was lying clear back over, bending over the pilot of the engine, in the pilot-beam and across the pilot-beam, inside of the flagstaff, between that and the boiler and the front end; he was close to the coupler—something like about three feet, or two and one-half feet, or something like that from the coupler to where he was lying. He was lying upon his back. He had been thrown back. Was mashed up apparently about the lower bowels. It looked as though he had been struck by the car and pushed over on the pilot-beam. We found him on his back and he looked as though the car had pushed him over and mashed him."

T. L. Livingston testified on the part of the defendant that he was a member of the train crew at Willow Springs on the 12th day of July, 1910, when the accident occurred; that it took place between 9:20 and 9:25 at night. He stated that when the engine was headed in on the side track, going north to where the six cars were stationed, he unlocked the switch in order to let the engine in on the side track, and that at that time he saw the deceased on top of the high car, being the second car, counting from the switch.

Digitized by Google

He could not tell what Hegberg was doing but saw his lantern up there. "We went down there (to the six cars) and when we got down there he was standing upon the high car. He got down and then stood on the ground, standing by the side of the car, after he had gotten off. Then I went ahead and coupled the engine to the first car of the three. Hegberg was still standing on the ground at the other end of the three cars to be cut off and gave the back-up signal and we backed towards the switch. He had already gotten off the high car and was standing on the ground before he gave the back-up signal. At the time, the cars were not moving—just standing there. The cars then moved down toward the switch. I continued to stand in the same place until the stock car came along and I caught on the side of it. Hegberg rode back to the switch on the rear end of the loaded coal car."

N. N. Hudson, the engineer of the crew, testified: "When we headed the engine in on track No. 1 to where the six cars were standing, Hegberg was then on one of the three cars. Livingston was behind the engine. When we got to the three cars, Livingston stepped off, opened the knuckle, and gave the signal to 'slack ahead' or 'couple up.' We took out three cars and left three standing. Hegberg was the brakeman who uncoupled the three cars from the other three. When we made the coupling to the engine, Hegberg gave me the signal to back south and I immediately did so." On cross-examination, the witness made the following statement: "Q. The first you saw was when you got up there, you saw somebody and you went by the signal, didn't you? A. Yes, sir. Q. You could not see his face? A. No, sir; I could not say that I did. Q. So you couldn't say of your own knowledge that it was Hegberg that uncoupled the cars? A. No, sir; I could not see his face to recognize its being Hegberg; by the way they were doing

Digitized by Google

the switching, the two brakemen, I naturally presumed it was Hegberg."

C. O. Hegberg, in rebuttal, by way of impeachment of Hudson, testified as follows: "Well, Mr. Hudson said the two brakemen got on the engine and they backed down the main line and one of them dropped off at the derailer and the other one went down and dropped off at the switch and threw the switch and they headed in to pick up the car. I asked him how he knew John (the deceased) and he said they had an extraordinary good headlight and he could tell it was John. He said that he got up on the high car and the other brakeman went back about to the place and he supposed to cut the cars off."

The plaintiff's prima facie case as to the duty of the defendant to set the brakes or otherwise secure them when the six cars were first set out on the side track at Willow Springs rests upon the evidence of C. O. Hegberg, who so testified, and who also testified that when the three cars were cut loose from the six, it was not the duty of the brakeman to see that the brakes on the remaining three were secure, but that such brakeman had a right to assume that all the cars had brakes set when they were first left on the side track.

From an examination of the evidence it will be seen that the principal witness for the defendant as to which brakeman cut loose the three cars from the remaining three was the brakeman Livingston, and that the principal witness for the plaintiff as to which brakeman cut loose the cars was George Slater; and when their testimony is carefully examined as to the controlling facts it is found to be in irreconcilable conflict, so that it is physically impossible that both should have given the true version of the facts and circumstances as to the uncoupling of the cars. If Slater is to be believed, Livingston was the brakeman who uncoupled the three cars from the three left stand-

Digitized by Google

ing. If Livingston is to be believed, Hegberg was the brakeman who uncoupled those cars. Slater's testimony tended to show that Hegberg was on top of the high car and released its brakes and continued on top of the car until the cars were uncoupled and had commenced to move south toward the switch and that he then got off; that the witness (Slater) saw a lantern of another brakeman near the place where the cars were uncoupled at the time he saw Hegberg on top of the high car. Livingston testified, on the other hand, that prior to the time he coupled the engine to the first car, deceased had gotten off the high car and was standing on the ground near the opening between the third and fourth cars and that the cars were then standing still; that Hegberg then uncoupled the cars and gave the signal to the engineer to back up. We are of the opinion that the testimony of Slater, together with that of C. O. Hegberg, as to the manner in which the brakemen usually discharged their several duties, furnished facts and circumstances from which the jury might reasonably infer that Livingston and not the deceased cut loose the three cars.

The rules of law governing appellate courts in determining the sufficiency of evidence to withstand a demurrer thereto have been often declared. In considering a demurrer to evidence, care must always be taken not to infringe upon the constitutional right of trial by jury; and, when the undisputed evidence in the record is susceptible of two inferences, one consistent with ordinary care, and the other tending to show negligence, such evidence, leaving a ground for difference between fair-minded men as to whether or not negligence existed (that is, if the evidence is susceptible of two inferences, one consistent with ordinary care, and the other tending to show negligence) the question is one of fact for the jury. This is the more apparent when it is considered that negligence is not a fact susceptible of direct proof but is an

Digitized by Google

inference deducible from the evidence, and its existence may be in issue though the facts on which it is based are not in dispute. It is also elementary law in this state that a demurrer admits every fact of the plaintiff's case to be true which the evidence tends to prove, whether the evidence be direct or indirect, as well as all reasonable deductions that are to be drawn therefrom, and defendant's evidence contradicting plaintiff's fills no office; and, before a court can take a case from the jury and consider the question of negligence as a matter of law, the facts must not only be undisputed, and the credibility of witnesses not drawn in dispute, but no material fact must be left in doubt, and the facts, when most favorably considered for the plaintiff, must be fairly susceptible of but one inference. [Morgan, Adm'r, v. Oronogo Circle Mining Co., 160 Mo. App. 99, 141 S. W. 375; Evans v. Railroad, 178 Mo. 508, 77 S. W. 515; Eckhard v. St. Louis T. Co., 190 Mo. 593, 89 S. W. 602; Williamson v. St. Louis T. Co., 202 Mo. 345, 100 S. W. 1072; McKenzie v. United Rys. Co., 216 Mo. 1, 115 S. W. 13.] Applying these rules to this case, we cannot say that the trial court committed error in overruling the defendant's demurrer to the evidence. Whether the evidence is examined to determine the decedent's contributory negligence or to ascertain the extent it overcome the plaintiff's prima facie case, the plaintiff's inviolable right to a trial by jury would have to be respected by the court. Where the petition is denied and plaintiff has the burden of proof, and has made out a prima facie case by oral evidence, the court has no authority to sustain a demurrer to the evidence, but plaintiff has the right to go to the jury on the question of the credibility of the witnesses; and though plaintiff's witnesses are uncontradicted, and defendant offers no evidence at all, the court has no right to direct a verdict, but defendant is entitled to have the jury pass on the credibility of the wit-

Digitized by Google

nesses. Link v. Jackson, p. 195, supra, 139 S. W. 588. The court committed no error in its refusal to peremptorily declare as a matter of law that deceased was guilty of contributory negligence by reason of his failure to secure the loose cars.

The appellant further contends that the deceased was guilty of contributory negligence in that he voluntarily selected a dangerous method of uncoupling the cars and could have avoided the accident by a safer course; that the appellant had provided the most approved appliances for the safety of the deceased and that it was his duty to use them.

The evidence on the part of the defendant tends to show that the engine had an automatic coupler at the time of the accident; that by the use of this coupler, the brakeman could reach in and catch hold of the rod, lift the rod, raise the knuckle-pin out, and let the knuckle open, without going between the engine and the car. The engineer testified that the deceased gave him the signal to stop and that the deceased was on the ground at the time. "He gave me the signal to stop and then jumped upon the pilot of the engine. I stopped the engine after going some twelve or fifteen feet. Then the collision of the three cars followed. He jumped upon the pilot before I could see anything of him. I never knew of him doing that before in attempting to make the coupling or uncoupling of the cars." The printed rules of the defendant company forbade brakemen to jump upon the pilot in coupling or uncoupling cars; and under the regulations of the company it was not permissible under any circumstances for employees of the company to ride upon the pilot while the engine was moving. The regulations had been in force two or three years before the accident took place and the deceased at that time had been four years in the employ of the defendant company and he was well acquainted with these facts. The evidence further tended to show that the

Digitized by Google

automatic coupler had a handle on both sides of the engine and that it could be lifted without the brakeman going in between the engine and the car. The ground was level where the accident took place, filled up to the tops of the ties, and there was nothing to prevent the deceased from taking hold of the automatic coupler and making the uncoupling while he was standing on the ground. Defendant introduced a number of its employees to prove these facts. The plaintiff in rebuttal introduced evidence tending to show that it was customary on the defendant's railroad for employees to go between the engine and the car while the same was in motion and ride upon the step or pilot of the engine to uncouple the cars while they were in motion and that such fact was known to the superior officers and acquiesced in as a common custom and practice. Also, there were facts and circumstances tending to show that the handle of the pinlifter of the engine was in such a position that in order to perform the duty of uncoupling the car it was necessary for the deceased to step upon the pilot or go between the engine and the car. The court on this subject gave the following instructions:

"(4) If you should find from the evidence that defendant had established a rule prohibiting its employees from being upon the pilot of the engine while the same was in motion still if you find that deceased, John Hegberg, just prior to the time of his death was attempting to uncouple the two cars from the engine and if you find that the handle of the pinlifter of the engine was in such a position that in order for him to perform his duty and uncouple said cars it was necessary for him to step upon the pilot or go between the engine and cars and if you find that an ordinarily prudent person under similar circumstances and conditions would have stepped upon the pilot or would have gone between the cars for the purpose of uncoupling and that it was the uniform

Digitized by Google

custom within the knowledge and acquiescence of the superior officer of the defendant for brakemmen to step upon the pilot or go between the cars while the same were in motion in coupling or uncoupling, then the violation of said rule by deceased, if you find it was violated, would not of itself defeat a recovery in this case.

"(5) Even though you may believe that defendant company had a rule requiring brakemen to couple and uncouple cars from the ground and you further believe that John Hegberg, deceased, was not at the time he was killed complying with that rule but was doing the work in a manner in which the same was customarily done by the employees and servants of defendant company with the knowledge and acquiescence of the superior officers of defendant company then such violation of the rule, if there was any, would not preclude a recovery in this case on account of the violation of said rule.

"(6) The jury are instructed in this case, the defendant pleads contributory negligence by John Hegberg, deceased; upon that issue the burden of proof is on the defendant, and it devolves upon the defendant to prove such contributory negligence by a preponderance of the evidence to the satisfaction of the jury, before you are warranted in finding for defendant on that issue, unless the evidence offered by plaintiff shows that he was guilty of contributory negligence. And in this connection you are further instructed that the law presumes that the said John Hegberg was in the exercise of ordinary care in the absence of evidence to the contrary.

"(7) If you believe and find from the evidence that John Hegberg got between the engine and the car to be uncoupled while the same was in motion, or was riding upon the step or pilot of the engine for the purpose of uncoupling the car, and further find that said Hegberg could, by the exercise of reasonable

Digitized by Google

strength and skill, and while upon the ground, have uncoupled the car from the engine by using the automatic coupler, and that if he so used the automatic coupler he would have avoided the injury, then you should find the issues for the defendant; unless you further find from the evidence that said Hegberg in getting between the engine and car to be uncoupled while the same were in motion or in riding upon the step or pilot of the engine to uncouple the car, if he did get upon or between the same while they were in motion, was performing said work in the usual and customary manner and that his superior officers knew of and acquiesced in such custom and practice.

"(9) The court instructs the jury that if you find and believe from the evidence that John Hegberg was not using ordinary care and exercising ordinary prudence at the time and place of his injury, and that the failure to use such care and prudence, directly contributed to cause his injury resulting in his death, then you will find for defendant, and you are instructed that ordinary care is such care as would be used by an ordinarily prudent person under the same or similar circumstances.

"(10) The court instructs the jury that the charge of negligence made by the plaintiff against the defendant in this action must be proved to the satisfaction of the jury by the preponderance of the evidence. The jury have no right to presume negligence and if the evidence does not preponderate in favor of plaintiff, then your verdict should be for the defendant."

We think these instructions as to contributory negligence were a correct embodiment of the law. The evidence was conflicting as to the common practice of getting upon the pilot and using the automatic coupler while the cars were in motion; and although the company had posted rules forbidding uncoupling by getting on the pilot or between the cars while the

Digitized by Google

uncoupling took place, if the company's officers knew of the violation of the rule and with their tacit consent had allowed the same to be habitually violated, the deceased in pursuing the usual method of uncoupling cars was not guilty of contributory negligence. [Brady v. Railroad, 206 Mo. 509, 102 S. W. 978, 105 S. W. 1195; Francis v. Railroad, 127 Mo. 658, 28 S. W. 842, 30 S. W. 129; Barry v. Railroad, 98 Mo. 62, 11 S. W. 308. At any rate, the burden of proof as to this issue was upon the defendant and it was for the defendant to show by a preponderance of the evidence the contributory negligence of the deceased, and the question was properly one for the jury.

Another question raised for the consideration of this court is the competency of certain testimony offered in chief by the plaintiff in his behalf. The father of the deceased was called as a witness and was allowed to testify as to the earnings of the deceased and the amount of money he had furnished and would furnish his father and mother during his lifetime and their dependence upon his earnings for their support. The record is as follows: "Q. How old was John Hegberg at the time he died? A. He would be twenty-eight on his next birthday. Q. Do you know how much he earned before his death? A. He earned from eighty to a little over one hundred dollars a month. Q. Now, state whether or not he was the only single member of your family? A. Yes, sir; he was. Q. He was not a married man? A. No, sir. Q. He was a single man? A. Yes, sir; a single man. Q. Now, Mr. Hegberg, state whether or not you and your wife were dependent, prior to his death; were you dependent upon anybody for support, if so upon whom? A. Yes, sir; we were. Q. Were you dependent upon anybody for support? A. Yes, sir. Q. Upon whom? A. Upon John Hegberg; he helped us whenever we needed it. Q. How long



Digitized by Google

had he been helping you? A. For the last five or six years. Q. For five or six years before his death? A. Yes, sir. Q. How much money did he contribute to your support? A. Sometimes he would give us a whole lot. Q. About what amount would he give you? A. Up as high as fifty dollars some months; some months twenty-five dollars and some months ten dollars. Q. Different sums that way? A. Yes, sir. Q. About what would it average per month? A. Taking it all together it would be thirty or forty dollars a month anyhow, on the average. Q. What is your age? A. I am seventy-two. Q. What is the age of your wife? A. About sixty-eight."

The plaintiff in introducing this evidence asked the witness whether or not he and his wife were dependent upon any one prior to the decedent's death and if so upon whom. This was objected to by the defendant as leading and for the reason that it was a suit by the administrator for the benefit of the estate. The witness was also asked to state his age and the age of his wife. The defendant objected for the reason that it was irrelevant and immaterial. The testimony was admitted over defendant's objections and exceptions. The objection to the question as to whether the witness and his wife were dependent upon the decedent was for the assigned reason that the suit was for the benefit of the estate.

The respondent insists with great earnestness that the objections made to this testimony are insufficient to bring the questions involved before this court for its consideration, basing such continuation upon the fact that objections were only made to portions of the evidence, as to whether the witness and his wife were dependent, and as to their ages. An examination of the record shows that the parts objected to belonged to the same class as the evidence admitted. The scope of the objection was that evidence as to the dependence of the father and mother upon their deceased son

Digitized by Google

was incompetent because the suit was by the administrator of the estate and it was not proper evidence to establish the measure of damages. Under the issues in this case we hold that defendant's objections were sufficiently well-timed and numerous enough to meet all the requirements of the law and that defendant was not required to keep up a running-fire of objections throughout the entire examination. [Bailey v. Kansas City, 189 Mo. l. c. 513, 87 S. W. 1182.]

The consideration of the competency of this evidence leads to an investigation of matters of original and vital importance. Prior to the revision of the statutes in 1909, the sections of the damage act material in this connection were sections 2864 and 2865. No action under them was given to an administrator, either for the benefit of the estate or collateral kin. Prior to the amendment of 1905, section 5425 (then section 2864) fixed the damages at five thousand dollars and did not contain the fourth clause authorizing a suit by the executor or administrator of the deceased. And prior to the amendment of 1907 of section 5427 (then section 2865) an executor or administrator could not maintain an action for the negligent killing of his testator or intestate—that is, the fourth clause appearing in section 5425 had not been incorporated by amendment into the latter sections.

This action must be maintained, if appellant's contention is true, under the provisions of section 5425. The Supreme Court has twice construed this section. In the case of Young v. Railroad, 227 Mo. 307, 127 S. W. 19, Division Number One of the Supreme Court, in an opinion written by Judge VALLIANT, expressly held that damages recovered under this section of the damage act are not given as compensation to the aggrieved but as a penalty which the law prescribes for the killing of a human being. Referring to the succeeding sections (5426 and 5427) the opinion states (l. c. 332): "If it be a case in which

Digitized by Google

the damages as for compensation to the person injured be in question, the jury after assessing compensatory damages may, in a proper case, look into the character of defendant's conduct to see if punitive damages should also be awarded. In the case at bar, however, the damages are not given as compensation to the party aggrieved, but as a penalty which the law prescribes for the negligent killing of a human being; it is all penal in its character and in fixing the penalty the jury have a right to consider the conduct of the negligent part beyond the mere finding that he was negligent; they may consider whether the conduct which resulted in the catastrophe arose from mere inattention, or was willful, wanton or reckless. That is what the jury does in assessing the punishment for a crime and it is what the amendment of 1905 to section 2864 authorizes the jury to do in assessing the amount of the penalty under that section of the statute." The Young case was decided March 1, 1910, and the opinion was concurred in by all the members of that division of the court. The courts of appeals construed this opinion as establishing the law that section 5425 provided for penal damages only. In the later case of Boyd v. Railroad, 236 Mo. 54, 139 S. W. 561, the question again came before the Supreme Court. The Boyd case was an action for damages by the widow under section 5425 for the wrongful death of her husband. At the trial the plaintiff offered to prove the number of her minor children and their ages. The Supreme Court, after an examination of the prior decisions as to the nature of damages to be awarded in such cases, under statutes in this and other countries, reached the conclusion that it was certainly intended in prosecutions for liability under this section that the jury should distinguish between a man of little or no earning capacity and one whose strong arm is equal to the demands upon it. The conclusions of the Boyd case were reached by applying

Digitized by Google

a different rule of construction than that which had been oftentimes invoked in prior constructions of these sections of the law. Instead of applying the rigid rule that statutes in derogation of the common law are to be strictly construed, the rule was applied that the statute, being highly remedial, should be liberally construed to effect its purpose; that on the remedial side, the jury might consider the extent of the pecuniary injury; and, as it had a penal side, the jury had a right to consider the facts of negligence in determining the defendant's culpability and the amount of damages to be allowed under that phase of the case.

In this case, the parties litigant antagonize each other as to which section of the damage act the suit is prosecuted under. As we have stated, the appellant contends it is under section 5425 and the respondent that it is under sections 5426 and 5427.

The causes of action given by the penal and compensatory sections of the damage act in case of a wrongful death resulting from negligence are diametrically opposite; the affirmative of the constituent facts of a cause of action under one section is a denial of them under the other. For a death resulting from the negligence of the peculiar character specified in section 5425, the aggrieved plaintiffs cannot elect to sue under that section *or* under sections 5426 and 5427. The right of action given by section 5425 is for a death caused by the negligence of a servant operating the defendant's instrumentality of transportation, while the right of action given in sections 5426 and 5427 is for a death caused by the negligence of the defendant through his servant in some other particulars, or by other parties, than those described in section 5425. These are purely statutory rights and must rest each upon its own statute. [Casey v. St. Louis T. Co., 205 Mo. 721, 724, 103 S. W. 1146; Casey v. St. Louis T. Co., 116 Mo. App. 235, 91 S. W. 419.] If the servants and agents of the defendant railroad

Digitized by Google

company killed the deceased under circumstances such as to create a liability under section 5425, Revised Statutes 1909, necessarily defendant is not liable for such killing under any other section. Contra, if the servants and agents of the defendant killed the deceased under circumstances making defendant liable under any other section of the statute than 5425, such defendant was necessarily not liable under such section.

It is held by the Supreme Court that it is not necessary for the pleader to designate under which of these sections his action is brought; nor would such description if once made be conclusive as to which section the liability was based upon.

The understanding of respondent in this action is that his petition was drawn under the so-called compensatory section. His evidence was given, the instructions were drawn, and the trial was conducted, all on that theory. In support of this position the respondent states in his brief that the allegations in his petition "when considered together based the cause of action upon the failure of the master to furnish the servant a reasonably safe place in which to work and that the injury did not occur through the neglect of the employee whilst running a car or train of cars. It is true that the master is required to furnish his servant a reasonably safe place in which to work and a failure to discharge that duty with resulting injury is actionable negligence. But where the place in which the servant is at work is rendered insecure and his injury and death results through the negligence of the servants of a railroad company whilst running, conducting or managing any locomotive, car, or train of cars, then a cause of action arises under section 5425. It is urged however by the respondent that under the evidence he could not recover under section 5425 because deceased was not engaged at work on a car and injured whilst it was being run, and that

Digitized by Google

the injury did not occur on account of the negligence of any servant whilst running the car where he was at work; that the injury was caused by the escape of the three cars which were not then being operated by any employee but which were stationed on the side track, and that for this reason the cause of action was based on the so-called compensatory sections (5426 and 5427). This is a misapprehension of the meaning of section 5425. The general purpose of the statute was to allow damages for the negligent acts of servants or employees (resulting in death) engaged in running, conducting or managing public conveyances controlled mostly by common carriers. It requires that the negligence of the defendant's employees must have concurred in point of time with the movement or operation of its cars, but not that the negligence must have concurred in point of time with the infliction of the injuries that cause the death. If any employee of defendant whilst running or managing its cars was guilty of negligence, and such negligence caused injuries to plaintiff's intestate which resulted in his death, then the defendant incurred the liability created by such section of the statute. And although the injuries resulting in the homicide are usually inflicted while the cars are being operated, and not subsequently, this need not necessarily be so. This is an interpretation of the statute that comports with the maxim, "Statutes made for the public good ought to be liberally construed."

The case of Buddenberg v. Transportation Co., 108 Mo. 394, 18 S. W. 970, was an action for wrongful death by reason of the defendant steamboat company having improperly landed the deceased at an improper place so that he fell into the river. The landing was at what was called the Diamond Joe wharfboat, which was a long, covered structure, boarded down to within seven feet of the floor. There were two openings on the river side, the small one being constructed so

Digitized by Google

as to be closed with guardrails on either side to protect persons and property, but which, on this particular occasion, were down. After the deceased had been safely landed, he was on the wharfboat giving directions as to loading his wagon with his goods, and while moving about near the opening fell overboard and was drowned. It was held by the Supreme Court that the action was based on section 2121, Revised Statutes 1879 (now section 5425) and that the liability was incurred by the negligence of the defendant whilst its servants were running, conducting and managing a steamboat. In this case the injury to deceased did not take place at the time of the negligent landing, but afterward.

Under the general rule of actionable negligence, the results of the negligence of the defendant's employees may have been long delayed, or the negligent act may have caused decedent's death in the twinkling of an eye, as the flash of lightning follows the thunderbolt. Neither the length of the chain of causation, nor the number of its links, nor the length of the period of time which elapses between the causal negligence and the resultant injury in any way affects the statutory liability. But while the injury need not immediately follow the negligent act, it must appear that the injury was the natural and proximate consequence of the negligence, and might and ought to have been foreseen by a reasonably prudent man in the light of all the attendant circumstances. [Paden v. Van Blarcom, 181 Mo. l. c. 127, 74 S. W. 124, 79 S. W. 1195; Poeppers v. Railroad, 67 Mo. 715.] The defendant's liability to the plaintiff in this case, if any, arose from the negligent act of the defendant's servants when they set the six cars out on the side track at Willow Springs and failed to securely fasten them by brakes or by blocking the wheels, or by reason of the defendant's brakeman (on the day of the injury, while in charge of and managing or controlling

Digitized by Google

the defendant's cars) negligently failing to secure the three cars which were left.

The plaintiff's petition does not in express or formal terms allege that defendant's servants so negligently managed and controlled its locomotive and cars as to cause the death of plaintiff's intestate, but from its statements, such facts are necessarily implied, and this is a sufficient averment of them. [Werth v. City of Springfield, 78 Mo. 107; Dillon v. Hunt, 82 Mo. 150.] As our statutory code of procedure prescribes no set formulae for stating a cause of action arising under the damage act, we are of the opinion that the petition in the case at bar, though informal, states the necessary, constituent facts in such a way as to apprise the defendant that plaintiff's cause of action was for a liability under section 5425, though plaintiff himself had a different view. [Little v. Mercer, 9 Mo. 218; Rodgers v. Fire Ins. Co., 186 Mo. 248, 85 S. W. 369; State ex rel. Iba v. Mosman, 231 Mo. 474, 490, 133 S. W. 38.]

The appellant further contends that under the allegations of the petition the action is one by the administrator to recover assets for the estate, and that in such an action the evidence given by decedent's father, which we have set forth, was incompetent.

As is well known, at common law no action could be maintained for damages for loss of life. The right of action, therefore, set up in plaintiff's petition is the mere creature of statutory indulgence. [Gilkeson v. Railroad, 222 Mo. 173, 121 S. W. 138.] Hence the statute must be looked into. Section 5425 after authorizing recovery of damages for wrongful death, under circumstances named, then proceeds to designate who may sue for and recover the same, in the following order: "First, the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the de-

Digitized by Google

ceased, whether such minor child or children of the deceased be the natural born or adopted child or children of the deceased; . . . or, third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor; or, *fourth*, if there be no husband, wife, minor child or minor children, natural born or adopted as hereinbefore indicated, or if the deceased be an unmarried minor and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator or executor of the deceased and the amount recovered shall be distributed according to the laws of descent." From the allegations of plaintiff's petition it is apparent that the action is brought to enforce a liability under the fourth clause of section 5425. The specific question presented is whether under a proper interpretation of this fourth clause of section 5425 the administrator sues for the benefit of the estate, or whether he sues as the personal representative of the distributees who would be entitled to the decedent's real and personal property under the laws of descent and distribution. Section 332, Revised Statutes 1909, of our statutory law of descents provides that when any person having title to any real estate of inheritance or personal estate undisposed of, or otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following course: ". . . second, if there be no children, or their descendants, then to his

Digitized by Google

father, mother, brothers and sisters, and their descendants, in equal parts." The deceased in this case was shown to have been over twenty-one years of age and to have been single and unmarried, so that the descent and distribution of his personal or real estate would be governed by the second subdivision of section 332, above quoted.

The true intention of the Legislature, as expressed in a statute, is to be ascertained by applying the well-known rule of construction that statutes are presumed to be enacted by the Legislature with full knowledge of the existing condition of the law and with reference to it, and are to be construed as a part of a general and uniform system of jurisprudence, and that their meaning and effect is to be determined in connection not only with the common law but also in connection with other statutes on the same subject. In the application of this rule, it becomes illuminating to trace the history of the legislation giving the right to damages to dependents and kindred for wrongful death and the rules generally adopted to enforce such right.

Lord Campbell's Act is the prototype of most of the modern legislative acts by the states which provide for the recovery of damages for wrongful death, and many of its features have been faithfully preserved in the later legislation. In this act, the executor or administrator sues for the benefit of the wife, husband, child or children, or parents, and not for the benefit of the estate of the deceased. And while it is true that there are very few of the statutes that are exactly alike, and none precisely like ours, yet most of them, modelled after Lord Campbell's Act, create a liability in favor of certain beneficiaries surviving the deceased; and such right of action is held to be an entirely new cause of action, distinct and independent of any right of action the deceased had during his lifetime or would have had if he had survived the in-

Digitized by Google

jury. In actions under this class of statutes the inquiry is as to the extent of the damage sustained by the beneficiaries in consequence of the wrongful death. [8 Am. and Eng. Ency. Law, 859.] A comparison of Lord Campbell's Act with sections 5426 and 5427 of our statutes will show how closely in matters substantial the statutes of Missouri have followed the English statute in allowing the suit to be brought for distributees and not by the administrator for the estate, with the distinction that the distributees, except those named in the fourth clause, sue in their own behalf.

The Florida statute has been cited as authority for the plaintiff's contention that under the fourth clause of our section 5425 the administrator has the right to sue for the benefit of the estate. The Florida statute provides that in case of a wrongful death, under circumstances which, if death had not resulted, would have entitled the person injured to maintain an action, then the parties who would have been liable for damages if death had not ensued will still be liable to an action for damages. It then provides who shall bring the action giving the right, first, to the husband or wife, if surviving, and if there is no husband or wife, to the minor child or children; and if there are none of these surviving, then the action is to be prosecuted by any person or persons dependent upon the person killed for support; and where there are none of these classes, then the action is to be maintained by the executor or administrator, as the case may be, of the person so killed. It will be noticed that the Florida statute omits entirely the distinguishing feature of clause four of the Missouri statute, namely, "*the amount so recovered shall be distributed according to the laws of descent.*" Under the Florida statute it was held by the Supreme Court of that state that it provided for an action by the administrator for the benefit of the estate. If the statute of Missouri had

Digitized by Google

not contained the concluding clause that the amount recovered should be distributed according to the laws of descent, the two statutes would have been almost identical, and it might have been interpreted to mean the same as the Florida statute. But such clause in our statute cannot be regarded as surplusage. If the Legislature had intended that the administrator of the estate should be entitled to sue for the benefit of the estate, the last clause should have been omitted, but such an interpretation cannot be given without regarding those words as surplusage. A familiar canon of statutory construction is that every word of a statute, where it can be consistently done, is to be given force and effect, especially if they are in harmony with the legislative intent as collected from the entire act, and that words of a statute will not be construed as unmeaning and as surplusage if a construction can be legitimately found which will enforce and preserve all its words. No matter which of these sections the suit is brought under, the damages must be sued for and recovered by the same parties in the same manner. Section 5427 provides that "in every such action the jury may give such damages, not exceeding ten thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue," which shows that the cardinal idea retained is that the surviving parties are to recover for the necessary injury resulting to them from such death, and excludes the idea that such administrator is entitled to bring the action for the benefit of the estate; nowhere is there an intimation that the damages are to be assessed for the benefit of the estate. To interpret the fourth clause of section 5425 as giving the administrator the right to bring the action for the benefit of the estate would be a sharp divergence from the real purpose of the statute as manifested in other portions of the act. The plaintiff alleges that he was

Digitized by Google

duly appointed and sues as administrator of the estate of John Hegberg, deceased, "and that plaintiff by reason of the death of the said John Hegberg, aforesaid, through the negligence and carelessness of the defendant as aforesaid, has been damaged in the sum of ten thousand dollars for which amount he prays judgment." This language can fairly be construed to mean that by reason of the death of John Hegberg his estate is entitled to that sum as damages to be recovered by his administrator for the benefit of the estate. No such action exists under either section of the statutes. We therefore conclude that the right of plaintiff to sue in this case, if such right exists, is as the trustee of an express trust and not for the benefit of the estate; and the beneficiaries provided for are the persons named in subdivision two of section 332 of the laws of descent and distribution.

The decision in the Boyd case, supra, declared evidence under the so-called penal section competent to show the amount of compensatory damages the widow had sustained by reason of the wrongful death of her husband. We see no valid reason why the same rule would not apply to beneficiaries under the fourth clause of the section as well as to those under the preceding clauses.

In estimating the amount of compensatory damages, if any are allowed, under section 5425, it would seem proper to apply the rule given by section 5427. It will not be assumed that the Legislature intended to make a different rule in case of a death occasioned by the negligent act of a transportation company or agents of a transportation company from that applied in case of a death occasioned by the negligent act of another corporation or person. And no good reason appears why there should not be one rule as to compensatory damages under whichever section they are recovered. It is apparent that no fixed rule can be established which can be adapted to all cases, but sec-

Digitized by Google

tion 5427 comes as near serving the purpose as any that has been devised; that is, that such an amount shall be allowed as the jury "may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue." By this rule the necessary pecuniary losses sustained by different persons who are next of kin are exceedingly variable. The loss by parents of a child of tender years, a husband losing his wife, or a wife losing her husband, all present cases of different pecuniary loss and involving different elements of damages. [Fordyce v. McCants (Ark.), 14 Am. St. Rep. 69, 71.]

In this case the compensatory damages are sought to be fixed by evidence showing the pecuniary assistance the deceased gave his father and mother during his lifetime by contributing money for their support out of his wages, and that they had a reasonable expectation of pecuniary benefit from the continued life of their son. The beneficiaries provided for by the fourth clause of section 5425, not being the immediate members of the decedent's family, are not in fact or in law by reason of the kinship, generally dependent upon the deceased, as the husband, or wife, or minor children usually are; and it would only be in cases where they have in fact been receiving pecuniary assistance, and then only to the extent of a fair and just estimate of their loss, that they could recover compensatory damages under section 5425. [Chicago & E. I. R. Co. v. Vester, 93 N. E. 1040; Fordyce v. McCants, supra, l. c. 70, 71.]

In this case the father and mother of the deceased were the only persons shown to have received support from the deceased during his lifetime; although having no legal claims on him, they were receiving pecuniary assistance from him and were dependent upon him to a certain extent, and were therefore entitled to recover compensation for the losses

Digitized by Google

they had sustained. [Chicago & E. R. Co. v. Branyan, 37 N. E. 190.] When the executor or administrator is entitled to recover for the beneficiaries designated by the statute, the jury are at liberty to take into consideration the reasonable expectation of pecuniary benefits, and the damages would be given only in respect to that expectation being disappointed, judged by the past, and for that purpose, they might take into consideration the ages of the deceased and the beneficiaries. [Chicago & E. I. R. Co. v. Vester, supra; Fordyce v. McCants, supra, l. c. 72.] The rule in such case is a hard one to apply as the damages are necessarily incapable of precise mathematical calculation and from their very nature are somewhat conjectural and problematical, dependent on the necessary pecuniary injury suffered, estimated from the facts proved, in connection with the knowledge and experience which the jury is supposed to possess in common with the generality of mankind.

Further objection is made to the testimony offered by the plaintiff for the reason that the collateral kin as a class have not suffered any damage, and that to allow damages for the pecuniary loss of the father and mother to the class, is to give the entire class the benefit of the loss of only two of the beneficiaries. Our so-called compensatory statute is very nearly a copy of the Wisconsin statute. An action was brought in that state under such statute by the administrator for the wrongful death of a widow and the question now before us was under consideration. The complaint showed that the deceased left surviving her eight children ranging in age from twenty-five years down to seven, and that three of the younger children were aged thirteen, eleven, and seven years. Two of the younger children, it seems, were in poor health, and on that account, by the death of their mother, their pecuniary loss was greater than that of the other children, and this was made an objection to evidence

Digitized by Google

offered to show the amount actually expended for their support. The court in passing on the question said: "We think the facts stated show that the three children named in the complaint as being of the ages of thirteen, eleven, and seven years, suffered a pecuniary loss by the death of their mother." And it was also competent on the question of damages, under the court's ruling; because incidentally under the statute the other collateral kin might be benefited by this evidence furnished no good reason for excluding it. [McKeigue v. City of Janesville (Wis.), 31 N. W. 298, 301.] While it might seem more consonant with justice to compensate those only who had sustained the loss, the intention of the Legislature must be given controlling effect. The statute of descents leaves no room for judicial construction as to the rule of distribution. Where there are no children or their descendants (as in this case), it directs that personal property shall descend and be distributed to the father, mother, brothers and sisters of the deceased, and their descendants, in equal parts.

The instruction given by plaintiff as to the measure of damages was as follows: "3. You are instructed that if you find for the plaintiff you will assess the damages at such sum as you may deem fair and just with reference to the necessary pecuniary injury resulting from such death, not exceeding the sum of ten thousand dollars." It will be seen how nearly its language follows that of section 5427; and it authorized the jury to award plaintiff only compensatory damages. It follows that the only basis in the evidence for the award of $7500 damages was the pecuniary injury of the father and mother resulting to them from the death of their son. As this case is to be remanded for a new trial, it is unnecessary on this appeal to discuss the question whether the judgment for $7500 under the evidence was excessive.



Digitized by Google

Instruction No. 2 given to the jury authorizing a recovery by the plaintiff was as follows: "If you find and believe from the evidence that the deceased, John Hegberg, was in the employment of the defendant as a brakeman on its freight train running from Springfield to Thayer, Missouri, and that upon arriving at Willow Springs, Missouri, the said John Hegberg together with the other members of the train crew were ordered to make up a train at said place and run the same to Springfield, Missouri, and that at said place there were six cars on a side track, one of which was to be placed on the main track and made a part of the train to be run to Springfield, and if you find that in order to place said car upon the main track it was necessary to remove two other cars immediately south of and in front of said car together with said car to the switch by means of an engine and kick said car upon the main track and thereafter kick the remaining two cars upon the side track, and if you find that said three cars remaining upon the side track after the other three cars had been separated therefrom were loaded cars and that the grade of said side track was downward, south and toward the switchstand, and that the defendant, its agents, servants and employees charged with that duty negligently failed and omitted to fasten and secure said cars and that by reason of said negligent failure and omission, if it was negligent, said cars escaped and ran south thereon and collided with the other two cars near the switchstand, and if you find that the said John Hegberg at the time of said collision was in the discharge of his duties as brakeman and was assisting in kicking said two cars upon the side track near the switchstand and that he was injured by reason of said collision and the negligence and carelessness of the defendant, its agents, servants and employees, as aforesaid, and without fault or negligence on his part and that said injury caused his death and that A. G. Heg-

Digitized by Google

berg is the administrator of his estate and that said John Hegberg at the time of his death was single and unmarried and over the age of twenty-one years, you will find for the plaintiff."

The facts presented in this instruction upon which the jury were required to determine defendant's liability were confined to what the jury should believe occurred on the day of the accident. While it is true the instruction requires the jury to find "that defendant, its agents, servants and employees charged with that duty negligently failed and omitted to fasten and secure said cars," the context shows that the duty of fastening the said cars referred to the duty of fastening the three cars on the day of the accident. If plaintiff by this instruction intended to base defendant's liability to any extent upon defendant's negligence in storing the cars on the side track in the first instance and on its failure to securely fasten the brakes on all the cars, the instruction should be so broadened as to cover the necessary facts upon which recovery for such negligence must rest. And further, as deceased was himself a servant of the defendant, the instructions should require a finding of negligence of the agents, servants and employees of the defendant, other than the deceased. To secure a proper administration of the law, it is important that instructions to the jury should be intelligible, couched in plain and unequivocal language so as to be readily understood by them, and thus present the law in clear, plain and concise terms. [State v. Darling, 202 Mo. 150, 100 S. W. 631.]

Defendant's motion in arrest of judgment assigned as a ground that the petition does not state facts sufficient to constitute a cause of action against the defendant.

As we have seen, the petition alleged that the deceased was over twenty-one years of age, single and unmarried, but does not allege that he left no children

Digitized by Google

surviving him natural born or adopted. It has been held that the allegation in a pleading that a person is single and unmarried does not necessarily mean that such person was never married, and that when the law provides that a proceeding can only be maintained where a party has a child, the charge that such party was single and unmarried but not stating that he had a child or children, was not sufficient. [7 Words and Phrases, 6520, "Single."] The word "unmarried," however, ordinarily means "never having been married," but it is a word of flexible meaning and slight circumstances would be sufficient to give it the meaning that the person has no husband or wife at the time in question. [Peters v. Blake, 48 N. E. 1012; Muller v. Balke, 47 N. E. 355; Frail v. Carstairs, 58 N. E. 401, 403.] The word "unmarried" when applied to an unmarried man or woman commonly implies that the person to whom it is applied has never been married. It may be used of a widow or widower and possibly of a divorced person. [Century Dict., "unmarried."] Hence applying our statutory rule that a pleading should be liberally construed with a view to substantial justice, especially after verdict, the word "unmarried" would properly be held to mean that the deceased had never been married, although over twenty-one years of age, and the charge that he was "unmarried" would be a sufficient allegation that he left no natural children; but the allegation that the deceased was "unmarried" would not be a statement of a fact from which it would naturally be inferred that he did not leave surviving him an adopted child or children. Our law concerning the adoption of children does not require that the father of an adopted child be a married man. [Sec. 1671, R. S. 1909.] The general law is that where the statute does not make any restrictions, an unmarried person may legally adopt a child. [Krug v. Davis, 87 Ind. 590.] To say that the term "unmarried" necessarily carries the

Digitized by Google

implication that the deceased had no adopted child or children would require us to disregard well-recognized principles of good pleading and interpolate into it constituent facts which the pleader has omitted to state. "In statutory actions of this sort, the party suing must bring himself strictly within the statutory requirements, necessary to confer the right, and this must appear in his petition; otherwise it shows no cause of action." [Barker v. Railway Co., 91 Mo. l. c. 94, 14 S. W. 280; Mathieson v. Railroad, 219 Mo. l. c. 548, 118 S. W. 9.] The attention of the trial court was distinctly called to this question in defendant's motion in arrest of judgment. This was sufficient. While the appellate court will indulge every presumption in favor of the jurisdiction of the trial court and give a liberal construction to the pleadings with a view to substantial justice, yet the requirement that the petition shall state a cause of action is indispensable and cannot be waived. A petition that does not state a cause of action is always open to review, at every stage of the case, at any time in any court, whether raised by demurrer or not. [Hudson v. Cahoon, 193 Mo. l. c. 558, 91 S. W. 72; Hanson v. Neal, 215 Mo. l. c. 278, 114 S. W. 1073.] Our statute has made a distinction between matter of error and exception. The record proper by law, is the petition, and subsequent pleadings, including the verdict and judgment. Section 2083, Revised Statutes 1909, has made it our duty, independent of any action of the attorneys, to examine the record, and if any error is apparent on the face of the record, to reverse the judgment *sua sponte* whether any exception is taken or not. [Bateson v. Clark, 37 Mo. l. c. 34; Broughton v. Brand, 94 Mo. l. c. 169, 7 S. W. 119; St. Louis, K. C. & C. Ry. Co. v. Lewright, 113 Mo. l. c. 669, 21 S. W. 210.] This has been the law of this state ever since the revision of the laws in 1885 and has been sanctioned by repeated decisions.

Digitized by Google

Other errors have been assigned by appellant as to the giving of instructions, refusal of requested instructions, and to the admission of evidence. These assignments have received consideration and are overruled as not prejudicially affecting appellant's substantial rights.

It follows from what has been said that the judgment must be reversed and the cause remanded, and it is so ordered. *Gray, J.*, concurs in the result. *Cox, J.*, concurs in the result and files separate opinion.

## SEPARATE CONCURRING OPINION.

COX, J.—I. I concur in reversing and remanding this cause but place my concurrence upon the ground that since the measure of damages upon which the case went to the jury was compensation alone, the verdict is excessive and the judgment should be reversed for that reason. Since the case is to be retried, the petition should be so amended as to clearly state facts which show the right of the administrator to sue under the fourth subdivision of section 5425, Revised Statutes 1909, and the trial should be conducted in harmony with the view expressed in the opinion of Presiding Judge NIXON.

II. On the question of contributory negligence the jury should be told in plain terms that if they should find from the evidence that it was the duty of deceased Hegberg to see that the three cars left standing on the switch had sufficient brakes set to hold them in place while the switching was being done and he failed to perform that duty then he could not recover, and this without any reference to the specific duty of the conductor for there is no evidence that the conductor was in any way negligent in this case.

III. The printed rule offered in evidence does not require the brakes to be set on all cars placed upon

Digitized by Google

a side track at the time they are placed there, but only requires that sufficient brakes be set to hold them in place. *Gray, J.*, concurs in paragraphs 2 and 3.

---

## OCTAVIA COLE, Respondent, v. WILLIAM H. WATERS, Administrator, Appellant.

**Springfield Court of Appeals, May 6, 1912. Motion to Modify Judgment Denied June 3, 1912.**

1. **WITNESSES: Administration: Witness Interested in Estate.** In an action against an estate of a deceased person on a claim for taking care of the deceased, the brother of deceased was *held* not disqualified as a witness, although he was interested in the estate of the deceased.

2. **———: Interested Party Not Incompetent.** The common law rule that a person having a pecuniary interest directly involved in the matter in issue and on trial is incompetent as a witness, has been abolished absolutely by section 6354, Revised Statutes 1909.

3. **INSTRUCTIONS: Comments on Evidence.** It is not the province of the trial court to charge the jury in respect to matters of fact, nor to select out certain facts and tell the jury what weight shall be given them.

4. **———: ———: Administration.** An instruction offered by defendant in an action on an account against the estate of a deceased person for taking care of and boarding the deceased is *held* erroneous as being a commentary on the evidence and that the court committed no error in refusing it.

5. **DEBTOR AND CREDITOR: Payment: Burden of Proof: Instructions: Administration.** In an action on account against the estate of a deceased person for taking care of and boarding the deceased where one of the defenses to the allowance of the claim is that of payment, the jury should be instructed that as to such defense the burden is upon the defendant and that unless he has shown by preponderance of the evidence such payment, the jury will find the issue as to payment for the plaintiff. The instruction given in this case is criticised as being misleading.

Digitized by Google

Appeal from Jasper Circuit Court.—*Hon. J. D. Perkins,* Judge.

REVERSED AND REMANDED.

*Thomas & Hackney* and *Shannon & Phelps* for appellant.

(1) The common law rule that a person having a pecuniary interest directly involved in the matter in issue on trial, and is disqualified to testify as a witness, has been abolished absolutely and unconditionally by section 6354, Revised Statutes 1909. Norvell v. v. Cooper, 155 Mo. App. 445; McKee v. Downing, 224 Mo. 115; Smith v. Brinkley, 151 Mo. App. 498. (2) The instruction that the burden is upon the defendant to prove to the reasonable satisfaction of the jury by a preponderance of the evidence, the defense of payment for the service mentioned in plaintiff's demand and for which suit is brought, is erroneous because it is a direction without qualification that the burden was on defendant to prove payment of plaintiff's demand, and thereby assumes that plaintiff had proven her case. This proposition is so well settled that no extended citation of authority is necessary. Connor v. Ins. Co., 78 Mo. App. 131. Said instruction is inconsistent with the first instruction given at the request of the defendant and the two instructions taken together are confusing and misleading and for these reasons the judgment of the circuit court should be reversed. Wood v. Fleetwood, 19 Mo. 529; Casey v. Steinmeyer, 7 Mo. App. 556. (3) Plaintiff's entire evidence tended to show that whatever remuneration she was to get, in addition to what she evidently got during the time Allen Fox lived with her, for the services rendered to the said Allen Fox was to come as a gift or legacy. Such being the case the instruction requested by defendant should have been given.

Digitized by Google

18 Cyc. 409, 410; Kelley's Estate, 6 Pa. Dist. 685; Sayer's Estate, 8 Pa. Ct. 32; McGeever's Estate, 9 Kulp (Pa.), 399; In re Weaver, 182 Pa. St. 349, 38 Atl. 12.

*R. W. Shuck* and *R. M. Sheppard* for respondent.

(1) The witness Tillman Fox was not a competent witness, and the court did not commit error in refusing to permit him to testify. R. S. 1909, sec. 6345; Bishop v. Inv. Co., 229 Mo. 723. (2) The refusal to permit Fox to testify if he was a competent witness was not prejudicial and would not in any way have affected the verdict or judgment in this cause. R. S. 1909, sec. 2082; Redman v. Piersol, 39 Mo. App. 176; Bagnall v. Bank, 76 Mo. App. 127; Crapson v. Wallace Bros., 81 Mo. App. 683; Irwin v. Ins. Co., 24 Mo. App. 153; Gardner v. Railroad, 135 Mo. App. 100. (3) One of the defenses interposed in this case was payment. The defense of payment is an affirmative defense, the burden of proving or establishing this defense is upon the party asserting it. Ferguson v. Dalton, 158 Mo. 323; Elliott on Evidence, sec. 2576; Christian v. McDermott, Est., 123 Mo. App. 448; Jennings v. Roberts, 130 Mo. App. 493; Bahrenburg v. Fruit Co., 128 Mo. App. 526; Trimble v. Moore, 125 Mo. App. 601. (4) In the case at bar, the evidence clearly shows that the deceased intended to pay plaintiff for her services, that he stated on several different occasions while they lived at Neck City and while they lived in Oklahoma, that the plaintiff would be well paid for her services. West v. Bryson, 99 Mo. 690; Hayden v. Parsons, 70 Mo. App. 497; McQueen v. Wilson, 51 Mo. App. 141; Ireland v. Spickard, 95 Mo. App. 62; Kostuba v. Miller, 137 Mo. 161; Sprague v. Sea, 152 Mo. 332; Bryan v. Harper, 167 Mo. 342.

Digitized by Google

NIXON, P. J.—Plaintiff, on May 1, 1911, filed in the probate court of Jasper county an account against the estate of Allen Fox, deceased, for taking care of, boarding, and washing for, deceased, from June 1, 1904, until July 1, 1909, being for five years and one month, at twenty-five dollars per month, amounting to $1525, with interest at six per cent from July 1, 1909, having the usual affidavit attached thereto. The case was tried in the probate court and there was a finding for the defendant from which the plaintiff duly appealed to Division Number One of the circuit court of Jasper county. The case was then tried during the November term and judgment rendered on December 4, 1911, in favor of the plaintiff for $1578.38, and the case is here on defendant's appeal.

The plaintiff offered evidence tending to show that Allen Fox lived at plaintiff's house and that he was boarded and lodged and his washing done by the plaintiff from about June 1, 1904, until July 1, 1909, being for a period of five years and one month; that Allen Fox was about sixty years of age and in his second childhood; that he was in bad health and had a running sore in his ear. There was evidence that when Allen Fox first came to plaintiff's house to live she had gone to the woods and the whole family was away, and when they reached home they found him there; that he had climed in the window and left his personal belongings, and that he came out in the yard and said, "Mamma, I come to stay until I die." He said, "Mamma, you will get paid for this." He made this statement a good many times. He was never seen to have any money in his possession, only what change he had in his pockets all the time. Virgie Cole for plaintiff also testified: "He never paid my mother anything that I know of. He said his money was in the bank and could not get it; he said Tillman had the check book. Tillman was his brother." She also testified that she knew of Allen Fox going to see Tillman

Digitized by Google

Fox. "I think I heard him say he went to see if he could get some money; sometimes he would say he would get some, and sometimes he would say Tillman would not let him have it. I have heard him speak about being there several times; don't know exactly how many." The evidence tended to show that board and lodging and washing in the neighborhood where plaintiff lived at the time deceased lived at her home was reasonably worth six dollars a week.

It was shown on behalf of the defendant that the deceased, Allen Fox, had from ten to twelve thousand dollars loaned out and in the bank at Neck City or Alba, and therefore had ample means to pay for his board and lodging and washing. Jerry Smith testified for the defendant as follows: "I had some conversation with Mrs. Cole about compensating her for caring for Mr. Fox. This was when Mr. Fox was living at plaintiff's house in Oklahoma and was coming back to Missouri. I gave Mrs. Cole ten dollars after we started from Cookson, and told her that I would give her that for her trouble in taking us to town. I told her I didn't know whether she had been paid for her trouble for keeping him or not, or words to that effect, and she said he didn't owe her anything. She told me that when I gave her the money. She said Mr. Fox didn't owe her anything." This witness further testified that after Allen Fox came with him to Missouri said Fox lived with him at his home near Alba or Neck City for about eighteen months, and that his work about the place and the house was ample to pay for his lodging and board and washing. Defendant offered Tillman Fox as a witness in his behalf, who testified as follows: "I live near Neck City. I am a brother of Allen Fox, deceased. Allen Fox lacked three days of being sixty-six years of age when he died. His physical condition during all the time he lived with Mrs. Cole was good enough. He chopped wood and worked in the blacksmith shop all

Digitized by Google

the time." The record then recites: "Here Mr. Sheppard interposed: 'I would like to ask this witness a question. You are a brother of the deceased, Allen Fox?' A. 'Yes, sir.' Q. 'He left no will?' A. 'No, sir.' Q. 'He was a single man?' A. 'A single man.' Q. 'Left no children surviving?' A. 'No, sir.' Mr. Sheppard: 'Now, we object to this witness testifying for the reason that he is not a competent witness.' The Court: 'I will sustain the objection.' Mr. Shannon: 'We except and we offer to prove by this witness that his brother, Allen Fox, deceased, was sound mentally, but that on account of the fact that he had an impediment in his speech and was hard of hearing and was not able to read and write, that the management of his business pertaining to the estate of the deceased Allen Fox before his death was transacted by this witness, Tillman Fox, and that that fact was known to Mrs. Cole, and that subsequently to the time Allen Fox lived with the plaintiff, he lived for eighteen months in the vicinity of where the witness lived, and that during that time the plaintiff never made any demand on Tillman Fox for the payment of this claim, or intimated that she had any claim against Allen Fox for or on account of caring for him, boarding him, or washing for him; and the defendant further offers to prove by this witness that during the time Allen Fox lived at Mrs. Cole's at Neck City, Missouri, his physical condition was such that he was able to perform considerable manual labor, enough to be the equivalent of the board and lodging and washing and other services rendered by the plaintiff. We further offer to prove by this witness that he furnished Allen Fox all the money that was required and demanded by Allen Fox for the purpose of paying his living expenses amounting to at least two hundred or three hundred dollars a year.'"

It will be seen that at the trial when Tillman Fox was offered as a witness, the respondent, after show-

Digitized by Google

ing that the deceased left no will and was a single man and had no children surviving him, objected to the witness testifying for the reason that he was not competent, which objection was sustained by the court. Tillman Fox was competent as a witness to prove any fact within his knowledge. The common law rule that a person having a pecuniary interest directly involved in the matter in issue and on trial is disqualified as a witness has been abolished absolutely and unconditionally by section 6354, Revised Statutes 1909, which provides: "No person shall be disqualified as a witness in any civil suit or proceeding at law or in equity, by reason of his interest in the event of the same as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility; *Provided,* that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, and no party to such suit or proceeding whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification, shall be admitted to testify in his own favor, except as in this section is provided, . . . ." It is claimed that the witness Tillman Fox was disqualified under the latter part of this section from testifying. Tillman Fox was not disqualified as a witness although he was interested in the estate of the deceased. The words of the latter part of that statute disqualify those "whose right of action or defense is derived to him from one who is, or if living would be, subject to the foregoing disqualification," and not those who claim through the deceased. [McKee v. Downing, 224 Mo. 115, 124 S. W. 7; Norvell v. Cooper, 155 Mo. App. 445, 134 S. W. 1095.] The evidence offered by the plaintiff tended to show that the

Digitized by Google

deceased did not have sufficient money to pay her anything on her account for his board and washing; that the money that he received from the renting of his blacksmith shop (about eight dollars a month) and other small amounts were hardly sufficient to pay for the clothes that he had purchased and the expenses of his attendance at circuses and picture shows which he went to and for medicine and medical treatment he had paid for when ill. The plaintiff's evidence was to the effect that he had ample means in his brother Tillman's possession amounting to eight or ten thousand dollars, and that deceased had often applied to him for money and been refused. The purpose of this evidence was to show that when the income and expenses of the deceased were considered he could not have had anything left with which to pay the plaintiff for her services. The defendant offered to prove by Tillman Fox that Allen Fox had all the money that was required or demanded by him for the purpose of paying his living expenses amounting to two or three hundred dollars a year. We think, considering the fact that the plaintiff and the deceased, the principal contracting parties, were disqualified from testifying, and from the facts and circumstances introduced by the plaintiff, that the evidence of this witness was competent. It will be seen that the plaintiff according to her own showing never made any claim for a period of five years for payment upon Tillman Fox, the brother of the deceased, for her services in caring for, boarding, lodging, and washing for the deceased, although she knew the deceased had a large amount of money in the hands of his brother.

The appellant complains because the trial court refused to give the following instruction:

"The jury are instructed that if they find and believe from the evidence that the plaintiff never made any claim or demand for payment for and on account of taking care of, boarding, and washing for, Allen

Digitized by Google

Fox, deceased, during his lifetime, then she cannot recover in this case, unless she has clearly and distinctly established a contract between her and the said Allen Fox, showing an intention on the part of the said Allen Fox to pay for said services, board and washing, and an intention on the part of the plaintiff to charge and receive pay for said services, board and washing; and you are further instructed that a failure on plaintiff's part to make claim for or demand payment during the life of the said Allen Fox for and on account of taking care of, boarding and washing for him, if she did fail to make such claim or demand, raises a presumption that he, the said Allen Fox, paid for said services in taking care of, boarding and washing for him, if there was a contract between him and her that he should do so."

We think this was a commentary on the evidence and the court committed no error in refusing it. It is not the province of the court to charge the jury in respect to matters of fact nor to select out certain facts and tell the jury what weight shall be given them. We think the court in giving the following instruction on the same subject left no just ground for appellant to complain: "The jury are instructed that if you find from the evidence that the plaintiff never demanded payment during the lifetime of Allen Fox for the services claimed to have been rendered by her in caring for, boarding and washing for him, that it must be presumed from such fact that the said Allen Fox had paid for his services, and that before you can find for the plaintiff under such circumstances, you must believe and find from the evidence that Allen Fox did not pay her for such services."

Complaint is also made by the appellant of the following instruction: "The court instructs the jury that the burden is upon the defendant to prove to the reasonable satisfaction of the jury by a preponderance of the evidence the defense of payment for the services

Digitized by Google

mentioned in plaintiff's demand and for which suit is brought. And if the defendant has failed to so prove to the reasonable satisfaction of the jury, they should not find against plaintiff on that account." We think this instruction might be misleading and that upon retrial the court should instruct the jury in few words and plain terms that one of the defenses to the allowance of the claim is that of payment and that as to such defense the burden is upon the defendant, and that unless he has shown by a preponderance of the evidence such payment the jury will find the issue as to payment for the plaintiff.

It follows from what has been said that the judgment should be reversed and the cause remanded for a new trial, and it is so ordered. All concur.

---

SELMA RIDENOUR, by Guardian, Respondent, v. WILCOX MINES COMPANY, Appellant.

**Springfield Court of Appeals, May 6, 1912. Motion for Rehearing Overruled June 3, 1912.**

1. **MINES AND MINING: Master and Servant: Safe Place to Work: Protection from Falling Rock: Negligence: Sufficiency of Evidence.** In an action against a mining company on account of the alleged negligent killing of a servant, who while working as a tub hooker at the bottom of shaft was struck by a heavy boulder which fell from an ore can as the same was being hoisted to the top, the evidence on the part of plaintiff tending to show that the injury could have been avoided by a continuance of the shaft through the open space, so that the ascending cans would be guided thereby; that rocks from the cans would be less liable to fall or would fall straight down through the shaft and not upon any one standing away from the shaft. There was also evidence that a snow shed might have been built at the bottom of the shaft to protect the deceased from falling rock. Defendant's evidence tended to show that it would not have been practical to continue the shaft to the bottom or to have built the snow shed on account of blasting in the mine. *Held*, that the evidence was sufficient to show a

Digitized by Google

causal connection between the acts of negligence complained of and the injury to the deceased and that the judgment for plaintiff should be sustained.

2. ———: **Pleading: Negligence: Protection from Falling Rock: Sufficiency of Petition.** In an action against a mining company on account of the death of plaintiff's decedent, who was struck by a rock falling from an ore can while he was working at the bottom of the shaft as tub hooker, the allegations in the petition relating to the negligent failure of the defendant to continue the shaft from the roof of the mine to the bottom and its failure to erect a snow shed so as to protect the deceased from falling rocks are examined and *held* sufficient allegations of negligence.

3. **MASTER AND SERVANT: Negligence: Duty to Install Appliance to Prevent Accidents.** In all occupations attended with great and unusual danger the master must use all appliances readily obtainable which are known for the prevention of accidents and the neglect to provide such readily obtainable appliances is proof of negligence.

4. **EVIDENCE: Expert Testimony: Operating Machinery.** The usual and ordinary way of constructing and operating machinery structures and appliances is a proper subject for expert evidence.

5. ———: **Hypothetical Questions.** The facts which a hypothetical question must cover should be governed largely by the subject-matter of each particular investigation and must be within the confines of the evidence and to a large extent is subject to the sound discretion of the trial judge.

6. ———: ———: **Objections to Question: Appeal and Error.** Objections to evidence to be available in the appellate court must be specific and the same rule applies in making objections to hypothetical questions put to an expert. The objection to such question should state why the question is not proper and what essentials are omitted.

7. ———: ———: ———: **Identity of Conditions.** In an action against a mining company on account of the alleged negligent killing of a servant while at work in a mine, an objection was made to a hypothetical question on the grounds that it did not show that the condition in the mines concerning which the expert was called upon to testify were the same conditions which existed in the defendant's mine. *Held*, that identity of conditions was not required in such cases and the hypothetical question propounded was proper.



Digitized by Google

8. **WITNESSES: Impeachment: Specific Delinquencies: Cross-Examination.** Although ordinarily the credibility of a witness cannot be impeached by specific delinquencies, but only by general reputation, yet on cross-examination the witness's credibility may be affected by questions which tend to reflect on his accuracy, veracity and morality and tending to show his depravity.

9. **EVIDENCE: Book Entries: Party Furnishing Items Should Testify.** Where a clerk makes entries from items furnished by another, but has no knowledge of their correctness and where such entries are made by a bookkeeper from reports made by a foreman, it is *held* essential that in addition to the oath of a party making the entries the party furnishing the items should testify as to their correctness.

10. **APPEAL AND ERROR: Assignment of Errors: Briefing Point: Waiving Error.** Where the appellant included in its assignment of errors the giving of an instruction on behalf of respondent but makes no further reference thereto, either in its first brief or reply brief, but in its additional reply brief again raises the point and makes an argument thereon, it will be deemed to have waived the assignment of error and the appellate court will not consider the point.

Appeal from Jasper Circuit Court.—*Hon. David E. Blair,* Judge.

AFFIRMED.

*J. P. McCammon* and *Bates & Stewart* for appellant.

(1) In order to make out a case it is necessary to prove that the alleged acts of negligence caused the injury. Brown v. L. & L. Co., 65 Mo. App. 166; Herke v. Railroad, 141 Mo. App. 617; Warner v. Railroad, 178 Mo. 125; Goranson v. Mfg. Co., 186 Mo. 300; Trigg v. Land and Lumber Co., 187 Mo. 231; Klebe v. Distilling Co., 207 Mo. 480. (2) It is not enough to show that Ridenour's death might have resulted from the acts of negligence. The burden was on respondent to show with reasonable certainty that these acts were the cause of the injury. Stickman v. Bank, 126 Mo. App. 664; Hodges v. Railroad, 135 Mo. App. 683; Ly-

Digitized by Google

man v. Dale, 136 S. W. 165; Jewel v. Mfg. Co., 143 Mo. App. 210; Warner v. Railroad, 178 Mo. 125. (3) It was more reasonable to infer from the testimony that the rock that killed Ridenour might have been caused to fall out by his failure to start the can straight or by pushing it out of line after it had already started and when there is conjecture as to the cause the court should take the case from the jury. Kelley v. Railroad, 141 Mo. App. 490; Harper v. Terminal Co., 187 Mo. 575. (4) It is competent evidence to show the frequency of cans bumping under conditions shown by appellant to be similar to those existing at the time of the accident, not only before the accident occurred but afterward. It is competent for the purpose of showing the probability of accidents happening. Trigg v. Land and Lumber Co., 187 Mo. 236. (5) The court erred in allowing plaintiff to attack the credibility of defendant's witness, B. F. Plumlee. The credibility of a witness cannot be impeached by specific past delinquencies but only by his general reputation in the neighborhood where he resides. Specific acts of lawlessness or moral turpitude are not admissible for that purpose. State v. Phillips, 233 Mo. 305; Wright v. Kansas City, 187 Mo. 693; State v. Gessel, 124 Mo. 533; State v. Rogers, 108 Mo. 204.

*D. C. Mallory, Ray Bond, Frank Lee* and *R. M. Sheppard* for respondent.

(1) On appeal the party in whose favor a verdict has been rendered is entitled to the benefit of every reasonable inference of fact which the evidence warrants to support the verdict, and where the verdict is for the plaintiff the evidence should be viewed by the appellate court in its most favorable aspect in support of the verdict. Arnold v. Cason, 95 Mo. App. 426; Cunliff v. Hansman, 97 Mo. App. 467. (2) In determining whether there was any substantial evi-

Digitized by Google

dence to sustain the verdict for the plaintiff the appellate court should not consider defendant's controverting evidence but should assume that the plaintiff's evidence is true and give it every favorable inference which may be reasonably and fairly drawn from it. Holloway v. Kansas City, 184 Mo. 19; Lackland v. Mining Co., 110 Mo. App. 634; Phillips v. Railroad, 196 Mo. 321; Hurst v. Mining Co., 141 S. W. 471; Hollowell v. Telephone Co., 195 Mo. 165; Phelan v. Paving Co., 115 Mo. App. 423; Morgan v. Mining Co., 141 S. W. 740; Evana v. Railroad, 178 Mo. 508; Eckhard v. Telephone Co., 202 Mo. 345; McKenzie v. Railroad, 216 Mo. 115. (3) The court did not commit error in permitting the plaintiff, upon cross-examination of the witness Plumbley, to ask him certain questions relative to his conduct, and which affected his moral standing and veracity. It is the law of this state that a witness may be asked upon cross-examination such questions as will show his moral standing and for that purpose he may be asked upon cross-examination if he has been convicted of any criminal offenses, or any other question which would tend to impugn his character for morality, veracity, honesty and virtue. O'Conner v. Transit Co., 106 Mo. App. 219; Real v. People, 42 N. Y. 270; Miller v. Association, 5 Mo. App. 401; State v. Forshone, 190 Mo. 326; State v. Long, 201 Mo. 675. (4) The court committed no error in refusing to show the number of cans of ore that had been hoisted from its mine from the time of the accident in question to the date of the trial. The court permitted the defendant to go into that thoroughly, as to any accidents that occurred prior to the trial. It is well settled in this state that negligence cannot be inferred from injury or the accident itself, and that upon the trial of a case where negligence is alleged that evidence of other accidents or injuries occasioned by the same alleged negligence is not competent to establish negligence, the converse is likewise

Digitized by Google

true that the fact that dangerous machinery, appliance or condition has been permitted to exist for a long period of time and no accidents or injuries resulted therefrom would not prove that the master maintaining said machinery or instrumentalities in the condition they were in was not guilty of negligence. Chase v. Railroad, 156 Mo. App. 701; Smart v. Kansas City, 91 Mo. App. 594; Goble v. Kansas City, 148 Mo. 470; Edwards v. Paving Co., 92 Mo. App. 225; Kelley v. Parker-Washington Co., 107 Mo. App. 495; State v. Hodges, 144 Mo. 54; State v. Zorn, 202 Mo. 48; Van Cleave v. Railroad, 124 Mo. App. 232.

NIXON, P. J.—This action was brought by R. N. Alexander as guardian of Selma Ridenour, a girl three years of age, for the alleged negligent killing of her father in the defendant's mine. Judgment was rendered in the trial court for the sum of two thousand dollars against the defendant from which it has appealed.

The allegations of negligence in plaintiff's petition upon which recovery was sought are as follows:

"That defendant, wholly disregarding its duty to said Jesse W. Ridenour in that respect, negligently and carelessly permitted the place where said Jesse W. Ridenour worked to become, be and remain in a dangerous and unsafe condition in this, to-wit, that the roof of the underground room or drift in which said Jesse W. Ridenour worked was very high and that said roof at the place where said shaft entered into said room or drift was between seventy-five and one hundred feet above the floor of said room or drift; that the place where said Jesse W. Ridenour stood and had to stand while performing his work was directly beneath the place where said shaft entered said room or drift; that, on account of the great distance from the floor to the roof of said room or drift and on account of there not being any method of guiding said

Digitized by Google

cans while ascending in said drift or room, said cans, loaded with dirt, ore and rocks, were liable to swing back and forth on the end of said cable into said room or drift while ascending and before reaching said shaft at the place where said shaft entered said room or drift; that on account of said cans swinging back and forth, as above described, in said room or drift, said cans were liable to strike the sides of said shaft when they entered into it, jarring said cans and causing the boulders and pieces of rock and ore in said cans to fall down and onto the place where said Jesse W. Ridenour worked and onto said Jesse W. Ridenour; . . . that defendant carelessy and negligently failed to build or cause to be built a box or continuation of said shaft from the place where it entered into the said underground room or drift through the roof of said room or drift to or near to the floor of said drift, so that cans ascending from said room or drift would be guided by said box or continuation of said shaft and render said cans less liable to jar against the sides of said shaft and so that any rocks or boulders falling from said cans would fall straight down and not fall upon said Jesse W. Ridenour; that defendant negligently and carelessly failed to build or cause to be built a shed over the place where said Jesse W. Ridenour worked, so that any rocks and boulders falling from said cans would strike upon said shed and not strike said Jesse W. Ridenour. Plaintiff further states that on or about said second day of June, 1911, while said Jesse W. Ridenour was performing his duties as the servant and employee of the defendant in defendant's said mine, said Jesse W. Ridenour hooked one of said cans onto said cable and said can, loaded with dirt, rock and ore was hoisted upward on the end of said cable by means of said hoisting machine; that, on account of the dangerous and unsafe condition of said place, as above described, when said can entered into said shaft and as it was ascending in said shaft.

Digitized by Google

said can struck against the side of said shaft, jarring said can and causing a large piece of boulder or rock in said can to fall from said can; that on account of the dangerous and unsafe condition of said place, as above described, said large piece of boulder or rock fell down onto, upon and against the head of the said Jesse W. Ridenour, severely injuring him," and causing his death.

The answer was a general denial, coupled with the admission that Jesse W. Ridenour was employed as tub-hooker in defendant's mine and that it was his duty to hook cans as described in plaintiff's petition, and a plea that he assumed the risks of his employment.

The reply was a general denial.

This mine was being operated by means of a vertical shaft through which the ore and dirt and rocks were hoisted by a steam hoister and a steel cable. The shaft was some five feet square. The room or drift in which deceased was working at the time of the accident was bell-shaped, some one hundred and fifty feet square at the bottom, being about sixty-five to one hundred feet in height, that is, from the floor to the roof. A. L. Keller testified that the shaft was straight up and down; that this room where the ore was taken up and where deceased worked was some two hundred feet square, and that from the bottom of said room to the roof thereof was about ninety-five feet. The distance from the bottom of this room to the roof was variously estimated to be from sixty to one hundred feet. The evidence shows that there was nothing in this vacant place leading from where the shaft entered the roof of this room to the bottom to guide the cans or tubs of ore, dirt and rocks while they were passing from the bottom of the room or drift to the mouth of the shaft. Mr. Keller stated that there was no continuation of the shaft through the open space, and not until the cans or tubs reached

Digitized by Google

the roof of the room or drift did they enter the shaft. The evidence of plaintiff tended to show that the tubs or cans that were hoisted bumped against the sides of the shaft as they were ascending; one witness testified that sometimes there would be as high as ten or twelve cans bump a day and then perhaps for two or three days they wouldn't hear a one bump; that every time a can bumped, something would fall out of it if it bumped hard enough. There was at the bottom of the mine, straight under the shaft, a platform. When the tubs or cans bumped, the falling rocks scattered over the bottom of the mine from twenty to thirty feet around this platform, falling all around in different places. On the morning of the accident the deceased was working at his duties as tub-hooker on the platform at the bottom of the shaft and had just started to step off the platform when the rock hit him. When the tub or can bumped on this occasion, some of the workmen cried "Run!" and the rocks fell all around the platform at the bottom of the mine. The tub or can had been loaded on the platform and a car had been rolled off the platform and the workmen were waiting for another car to be brought up when rocks commenced to fall around the bottom of the shaft. Witness Rutherford testified concerning the accident as follows: "Q. What first attracted your attention to this accident to Mr. Ridenour? A. Well, sir, I was standing right beyond the tub-hooker, Jesse W. Ridenour, and his brother was right opposite of me, and it looked to me as though he fell, started to run and fell. I heard the tub bump and he fell across the shaft from me. Q. You say you heard the tub bump? A. Yes, sir. Q. Did you see anything falling there? A. Yes, sir; boulders. Q. How many? A. Well, sir, I couldn't count them; all I saw at that particular time was three large ones rolling out towards where I was, out in that direction. Q. Where was he with reference to the place

Digitized by Google

where the tubs were hooked onto the cable? A. He was standing right at his post rolling an empty can; he hooked this can out and was rolling the empty back on the car in a stooping position."

There was evidence on behalf of plaintiff that the common and ordinary method in use in that district to prevent injuries to men working in drifts or rooms of the character of the one in question was to lace or crib the shaft down, or to build a heavy snow-shed at the bottom; that ordinarily they are cribbed down to about the height of a man's head and that an opening is then left for the man to enter and hook or unhook the cans, so that as soon as he has done so he may step back out of the line of the shaft and be out of the way of falling objects. Where snow-sheds are used, they are constructed so that one end of it is in line just under one side of the shaft, so that a man in hooking and unhooking tubs can stand under the shed and perform his duties and be protected from falling objects. That where mines of this kind are being operated and there is a drift or room in which it is a long distance from the bottom of the room to the roof where the shaft enters the room, the usual or ordinary way of building or operating the mine so as to afford protection to persons who are working at the bottom of the shaft is either to lace the shaft down or crib it, or to build a heavy snow-shed at the bottom; that ordinarily they are cribbed or laced down to a reasonable depth—eight or ten or twelve feet above a man's head. In the mines where cribbing or lacing is impracticable, the usual practice is to construct a snow-shed by setting up four heavy posts and then putting heavy caps on top of them and covering with heavy lumber or logs; and the shed would be built just far enough over in the shaft so the cans would miss it a foot or two feet, to protect the workmen below from rocks that might fall out of the cans. That taking into consideration the expense of build-

Digitized by Google

ing a snow-shed and the fact of working in hard ground where dynamite is used to blast out the ore, it would be practicable to build a snow-shed near the place where the cans were being hooked onto the cable. Where the mining is in a large room, and where it is quite a distance from the bottom of the room where the men work to the roof where the shaft enters the room, the practice is to crib down the shaft or construct a snow-shed. That it is practicable and would be practicable in a mine in which there is a large room some two hundred feet square which is from seventy-five to one hundred feet in depth to crib down in the manner described.

The defendant's hoisterman testified in its behalf substantially as follows: That defendant had provided what is known as a center pull which would be a guide to the tub hooker in determining whether or not a can that was to be hoisted was in the center of the shaft when it started. That there is a place fixed at the bottom of the shaft where the cars run into the shaft—what is called the center pull—so that when a car gets in the center of the shaft the car wheels drop down in notches; that was measured and figured to be the center of the shaft. That he had had a great deal of experience as a hoisterman. He stated that but one other can had bumped in the shaft during the time he was hoisterman, from the time the mine started up in April to the time of the accident, and that this particular can that was carrying the rock which killed Jesse W. Ridenour bumped after it entered the mouth of the shaft, from ten to twenty feet above the line of entrance.

The State Mine Inspector for that district testified in behalf of defendant as follows: "Q. I will get you to state from your experience as a miner and examination of the mine, that it was practicable to place a continuation of the shaft by means of lacing or by means of cribbing from the point where it enter-

Digitized by Google

ed the top of the drift to the bottom in mines of this character? A. It wouldn't have been at that place at that time? Q. For what reason? A. The reason was, there was taking up a stope and shooting in that ground, would have shot any timbers or anything that would have been a continuation of that shaft down; they couldn't have held it in place at that time. Q. Now what was the character of that ground? A. That ground in the Chitwood district is of boulder formation. Q. What about the hardness of it, whether it requires very much powder or little? A. It would require a good deal of powder. Q. How much of a stope were they taking up at that time, do you remember? A. Six or eight feet; it might have been ten feet. Q. In regard to the distance away from the shaft where they were working, how far were they taking up this stope? A. As I remember, right on one side of the shaft they couldn't have been over thirty-five or forty feet, something like that, to the best of my recollection."

The defendant's ground foreman testified that the shaft was started in April, 1911, and that deceased commenced work on the twenty-ninth of May following and was killed on the second of June thereafter. That he never knew of any cans bumping against the sides of the shaft prior to the one which caused this accident. That there had been hoisted out of the mine an average of three hundred to four hundred cans of ore and dirt daily, depending on the number of shovelers, and that the mine was worked six days a week, steadily. On cross-examination the witness was required to answer in regard to having been convicted for drunkenness and for keeping company with prostitutes and staying with them at night and going on their bonds in police court.

The defendant's bookkeeper testified that he kept a daily record of the cans of ore taken out of the mine and that between the eighteenth day of April and the

Digitized by Google

second day of June (1911), 8037 cans were taken through the shaft.

Frank B. Wilson testified for the defendant that he was the manager of defendant's mine and that no complaint was ever made to him in regard to cans bumping against the shaft, or anything of that character being wrong in the mine. That there was no reason in continuing the shaft down from the roof of the room to the floor and that it was not practicable to do so; that the ground was hard, with a substantial roof, and that it would not have been practicable from the way the mine was being operated at the time to have continued the shaft down to the ground or to have built a snow-shed for the protection of the operatives by reason of the danger of shooting it out in the operation of the mine.

Defendant further offered to prove by its bookkeeper that subsequent to the injury and up to the time the suit was instituted a large number of cans of ore had been hoisted from the mine below and that no accident had occurred, which evidence the court rejected.

Appellant contends that the petition is insufficient because it fails to state a cause of action, in this, that it does not allege that the failure to continue the shaft from the roof of the room or drift to the bottom was the cause of the can bumping, thereby causing the rock to fall and kill the respondent's father, but does allege that the failure to have such a guide by extending the shaft rendered the cans elevated through the shaft more liable to bump against its sides. This is a misapprehension of the full scope of the plaintiff's petition. The specific charge of the petition is that the defendant "carelessly and negligently failed to build or cause to be built a box or continuation of said shaft from the place where it entered into the said underground room or drift to or near to the floor of said drift, so that cans ascending

Digitized by Google

from said room or drift would be guided by said box or continuation of said shaft and render said cans less liable to jar against the sides of said shaft and so that any rocks or boulders falling from said cans would fall straight down and not fall upon said Jesse W. Ridenour." The import of this language is unmistakable, and it not only alleged that the defendant's failure to continue the shaft from the roof to the floor of the room or drift was negligent, but alleged that a continuation of the shaft from the roof to the floor of the room would have rendered the loaded cans less liable to jar, and in addition would have caused any rocks or boulders that should fall from the cans while being hoisted through the shaft to drop straight down the shaft and not fall upon the deceased where he was required to work. The further charge in the petition was that a continuation of the shaft should have been constructed by the defendant so as to have prevented the ascending cans loaded with ore and rock from swinging back and forth on the end of the cable and thus have prevented the consequent liability to strike against the sides of the shaft where it entered the roof and precipitate its contents of rock and ore on the workmen below on the floor of the mine. The petition also alleged "that, on account of the dangerous and unsafe condition of said place, as above described, when said can entered into said shaft and as it was ascending in said shaft, said can struck against the side of said shaft, jarring said can and causing a large piece of boulder or rock in said can to fall from said can; that on account of the dangerous and unsafe condition of said place, as above described, said large piece of boulder or rock fell down onto, upon and against the head of the said Jesse W. Ridenour, severely injuring him," and causing his death.

Appellant further contends that the respondent failed to make out a case in that the evidence wholly

Digitized by Google

fails to show a causal connection between the alleged acts of negligence of the defendant and the injury and death of her father. In support of this contention the appellant points to the evidence as being practically uncontradicted that the mine had been cut out to a considerable extent below the ground, forming a room one hundred feet by two hundred feet, bell shaped; that the distance from the roof to the floor of the room was from seventy to one hundred feet; that there was no continuation of the shaft from the roof of the room to the floor, nor was there any snow-shed; and that the only acts of negligence charged in the petition and which respondent sought to sustain by her evidence were the negligent failure of the defendant to continue the shaft or erect the snow-shed. Also that the evidence tended to show that deceased at the immediate time of the injury was standing at his post of duty directly under the shaft and was struck by the falling rock. The appellant's reasoning is that the continuation of the shaft or the erection of the snow-shed would have been of no benefit whatever to the deceased and that his death would have resulted notwithstanding such constructions if he had stood in the shaft as the rock would have fallen down the shaft on him causing the injury, notwithstanding the extended shaft. But this reasoning fails to take into consideration important evidence in the record to the effect that without the continuation of the shaft not only was the ascending can loaded with ore and rock and dirt more likely to strike the sides of the shaft, but when it did in fact bump against the sides of the shaft, would empty a part of its contents, which in descending from the roof of the room was scattered broadcast over the floor of the mine ten or fifteen feet on either side of the platform immediately under the shaft; and the tub-hooker discharging his duties under these conditions was equally safe, so far as the evidence shows, whether he was immediately under the

Digitized by Google

opening in the shaft or ten or fifteen feet on either side of the opening. As there had been no place of shelter provided for him, it was impossible for him by changing his position to secure a place of refuge from the falling rock. The appellant contends that because the deceased under conditions then existing under which he was required to work, stood in the shaft, therefore, if his master had provided him a reasonably safe place of shelter, he would still have stood in the same place of danger directly under the shaft and received the same injury. We decline to enter into such a boundless field of conjecture. There is no rule of law or reason that requires us to believe that the tub-hooker at work at the bottom of this mine, if the shaft had been continued or a snow-shed had been erected so that by stepping a few feet to one side he would have been amply protected from falling debris, would not have availed himself of such protection when it was provided for him. Such a conclusion would require us to ignore the instinct of self-preservation and disposition of men to avoid personal harm.

Appellant also claims that material error was committed by the trial court in allowing improper hypothetical questions to be propounded to the plaintiff's expert witnesses Christman and Holderman; that these witnesses were allowed to give testimony for the purpose of showing what was practicable to be done at appellant's mine in the way of constructing a continuation of the shaft and a snow-shed which the plaintiff's petition alleged constituted defendant's negligence, and for the purpose of showing what was the usual and ordinary way of working mines in that mining region under conditions similar to those existing in appellant's mine. After the witnesses had qualified as experts, the record recites: "Q. I will ask you to state if you ever worked in any mines or have been in any mines and observed the

Digitized by Google

method of working that are mined by means of a vertical shaft through which the ore is hoisted and in cases where the shaft opened up into a drift or room which was very deep, say from fifty to one hundred feet deep? A. Yes, sir. Q. Where the shaft came into the roof? A. Yes, sir. Q. How many different mines of that kind have you worked in or known of and been in and observed, Mr. Christman? A. Half a dozen, I suppose. I can't just remember, but that many, I reckon. I never was in any I never worked in. Never had no business to be in them. Q. Where a mine of that kind is being operated and you have a drift or room which is a long distance from the bottom of the drift or room to the roof of it where the shaft comes into the room, what is the usual and ordinary way of building or operating the mine in the way of protection to the persons who are working at the bottom, if any? Mr. Bates: We object to that for the reason that it is not a proper question to ask of this witness because he hasn't shown that conditions in those mines are the same as the conditions in this mine."

In all occupations attended with great and unusual danger, the master must use all appliances readily obtainable which are known for the prevention of accidents, and the neglect to provide such readily obtainable appliances is proof of negligence.

The usual and ordinary way of constructing and operating machinery, structures and appliances is a proper subject of expert evidence. [Combs v. Rountree Construction Co., 205 Mo. 367, 104 S. W. 77; Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673; Spencer v. Bruner, 126 Mo. App. 94, 103 S. W. 578.]

The question as to what facts may be submitted in the form of a hypothetical question to the judgment of an expert has been the subject of much controversy and diversity of judicial decision. In every case

Digitized by Google

the facts which the hypothetical question must cover should be governed largely by the subject-matter of each particular investigation and to a large extent subject to the sound discretion of the trial judge, but the rule in this state is an unbending one that the facts embraced in the hypothetical question put to the witness in every case must be within the confines of the evidence. [Benjamin v. Metropolitan St. Ry. Co., 50 Mo. App. 602; Russ v. Railway Co., 112 Mo. 45, 20 S. W. 472.]

It is the general rule in this state that objections to evidence to be available in the appellate court must be specific, and since no court can intelligently rule upon a question without understanding the question and the objection to it, it becomes the duty of counsel to make their objections specific and certain, and if they refuse to do so and the court overrules the objection to the offer of evidence, no error is committed by the trial court which will be available on appeal. The same rules are applied in making objections to hypothetical questions put to an expert; counsel must point out in what particular the question is objectionable, what facts are improperly grouped, and in what manner and for what reason they are misleading. To come within the rule, the objection to the hypothetical question should state why the question is not proper and what essentials are omitted. [Holton v. Cochran, 208 Mo. 314, 106 S. W. 1035; Orr v. Bradley, 126 Mo. App. 146, 152, 103 S. W. 1149.] In the case last cited, the objection to the hypothetical question was in these words: "Defendant's counsel objected to the question as not a proper hypothetical question, omitting necessary essentials, and stating those that are not proven, incompetent, irrelevant and immaterial." The court in reviewing the sufficiency of the objection, said: "The objection should have stated why the question was not proper, what necessary essentials



Digitized by Google

were omitted and what it stated which were not proven," citing O'Neill v. Kansas City, 178 Mo. 91, 100, 77 S. W. 64, and Roe v. Bank, 167 Mo. 422, 67 S. W. 303.

In this case the objection to the hypothetical question was based upon the assumption that the question did not show that the conditions in the mines concerning which the expert was called upon to testify were the same conditions which existed in the defendant's mine. This, it will be seen, was requiring identity of conditions, and if such a rule should be strictly applied it would be impossible in analogous cases to offer any expert evidence because no two mines are operated under precisely identical conditions.

In this case the hypothetical question propounded to the witness assumed only such facts as the plaintiff's evidence had already tended to establish and asked the opinion of the witness as to what was the usual and ordinary way of operating such a mine in the way of protection to persons working at the bottom, if any. We think the hypothetical question was not fatally defective in assuming facts which the plaintiff's evidence fairly tended to prove and in obtaining the expert's opinion as to what protection if any was generally afforded to operatives in mines constructed as this was. [Hicks v. Railway Co., 124 Mo. 115, 27 S. W. 542; Fullerton v. Fordyce, 144 Mo. 519, 44 S. W. 1053; Turney v. Baker, 103 Mo. App. 390, 77 S. W. 479.]

The objection that appellant makes to this hypothetical question in this court is that appellant's evidence showed that at the time of the accident the workmen in the mine were taking up a stope about twenty-five or thirty feet away from a point at the bottom of the shaft where the tub starts up the shaft and that the character of the ground that they were operating or blasting was very hard, and that the taking up of the stope and the hard ground which was being mined

Digitized by Google

were essential factors in determining whether it was practicable to continue the shaft downward or erect a snow-shed, and that these factors should have been embodied in the hypothetical question.

In this connection it may be noted that the expert witnesses for the defendant testified that it was not practicable to place a continuation of the shaft by means of lacing or cribbing from where it entered at the top of the drift to the bottom of the mine for the reason that they were taking up a stope and that shooting in that ground would have shot down any timbers or destroyed any erection on account of the blasting.

We find, however, that the plaintiff's expert witness was asked the following hypothetical question: "I will ask you to state if, in your observation and experience as a miner, whether or not the shaft could be extended down through an open room or drift in that way in such a manner it wouldn't be affected by the blasting that was carried on in the mine? A. I have had that happen too, but where it interfered with that or broke any of that out we remodeled it and fixed it again and where it would be too much trouble we would build a heavy snow-shed, something a shock wouldn't knock down. Q. I will ask you to state if in your observation and experience as a miner, taking into consideration the expense and the fact that you are working in hard ground where it is necessary to break up the earth and ore, whether or not it is practicable to build a snow-shed of the kind you describe? State whether from your observation and experience as a miner, taking into consideration the expense of building a snow-shed and the fact that you are working in hard ground where you had to use dynamite to blast out the ore, to get the ore, whether or not it would be practicable to build a snow-shed near the place where the cans were being hooked onto the cable? A. I think it would; yes, sir." On cross-examination the witness testified: "Q. Don't

Digitized by Google

you know when they shoot in ground as hard as that it throws boulders fifty or sixty feet? A. Yes, sir; but they can turn those shots away from the shaft as well as toward the shaft."

Under the facts disclosed, we are of the opinion that no material error was committed in overruling the objection and admitting the testimony.

Appellant contends that the judgment should be reversed on account of material error in allowing improper impeachment of its witness, B. F. Plumlee, on the ground that the credibility of a witness cannot be impeached by specific delinquencies but only by general reputation. In this case the plaintiff was allowed to prove, by way of impeachment, on cross-examination, that this witness had pleaded guilty to charges of drunkenness and had consorted with prostitutes.

The rule was well stated by our Supreme Court in the case of State v. Long, 201 Mo. l. c. 675, 100 S. W. 587, as follows: "The better doctrine would seem to be that, while such questions may be asked the witness on cross-examination, it is a matter largely within the discretion of the court before whom the case is to be tried. Had the witness in this case claimed his own exemption on the ground that his answer thereto might tend to incriminate him, unquestionably he should have been excused from answering it. He asked no exemption and properly answered the question, and the authorities cited show that it was not error to permit the question to be asked." In O'Connor v. St. Louis T. Co., 106 Mo. App. l. c. 220, 80 S. W. 304, the rule is thus stated: "It is the law that on cross-examination the credibility of a witness may be affected, impaired or totally annihilated by showing from his own mouth his moral rottenness or total depravity, and for this purpose he may be asked on cross-examination, if he was ever in jail or state's prison and how much of his life had been passed therein." In Miller v. St. Louis Hospital Ass'n, 5

Digitized by Google

Mo. App. l. c. 401, the court approvingly quoted the following from Stephen's Dig. Law of Ev., 123: "When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend to test his accuracy, veracity, or credibility, or to shake his credit by injuring his character. He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except," where the answer might expose him to a criminal charge.

The appellant further complains of the action of the trial court in refusing to admit evidence to show the frequency of the bumping of the cans or tubs after the accident under conditions similar to those that existed before the accident, for the purpose of showing the probability of accidents happening. The excluded evidence was that of George D. Carter who was the bookkeeper of the defendant corporation. He testified that he was the bookkeeper for the defendant at and subsequent to the time of the accident; that in the records kept by him was the daily report, the operating report, and everything done pertaining to the mine; that he kept a report of the cans that were hoisted and that the book which he had with him showed the daily and total numbers of cans hoisted. He was allowed to state the number hoisted prior to the accident. The question was then asked him what was the number of cans hoisted in that mine from June the second (the date of the accident) until October the thirty-first, which was objected to and the evidence was by the court excluded. It will be seen that there was no foundation laid for the introduction of this evidence such as that the entries proposed to be offered in evidence were made contemporaneous with the hoisting of the cans in such a way that they could be said to be a part of the *res gestae;* and further, that the bookkeeper himself did not pretend

Digitized by Google

that he had any actual knowledge of the facts as to which he was called upon to testify, but stated that the information from which the entries in his books were made up was communicated to him by some other person. It does not appear that it was the duty of any employee of defendant company to report to the bookkeeper the number of cans hoisted for entry on his books, or that any person having actual knowledge of the number of cans hoisted made the report to the bookkeeper. Where a clerk makes entries who has no knowledge of their correctness but makes them from items furnished by another, as where entries are made by a bookkeeper from reports made by a foreman, it is held essential that in addition to the oath of the party making the entry the party furnishing the items should testify to their correctness. [17 Cyc. 394.]

Appellant in the first instance filed in this court its brief which contained an "Assignment of Errors;" following this, and under a separate heading (Points and Authorities), is found stated the points relied on for reversal together with authorities cited under each point; and under another heading (Argument) the questions involved in the case are discussed. The respondent in due time filed a statement and brief. Thereupon the appellant filed its reply brief and argument, and later filed an additional reply brief and argument. The only attack made on the sufficiency of the instruction given for the plaintiff is found in the assignment of errors in the original brief of the appellant. The appellant, neither in its "Points and Authorities," nor in its "Argument," in such brief, made any reference to any alleged error in the giving of said instruction; nor does any reference to it appear in appellant's reply brief; *but in its additional reply brief and argument,* appellant states: "In addition to the points made in the reply brief of the appellant heretofore filed, appellant insists that the instruction

Digitized by Google

given at the instance of the plaintiff was error for the following reasons," and proceeds to enumerate them.

The rule of this court (Rule 18) is that all briefs "shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities under each point. Any brief failing to comply with this rule may be disregarded by the court. The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to errors not thus specified, unless for good cause shown this court shall otherwise direct." This rule also requires that appellant shall serve the respondent with a copy of his brief thirty days before the day on which the cause is set for hearing, for the purpose of giving the respondent an opportunity to meet any questions presented by appellant for reversal of the judgment.

To permit the appellant *in an additional reply brief* to reopen the whole question as to errors committed by the trial court, not specifically pointed out or referred to in its previous briefs would be a great injustice to the respondent as it would require at his hands, in order to make an answer to the questions thus urged for the first time, the duty of publishing another brief, and often require of this court an extension of time for that purpose, and would lead to confusion and delay in appellate practice. "The respondent of course is only required to meet the questions urged by appellant." [Stid v. Railroad, 236 Mo. 382, 397, 139 S. W. 172.] An assignment of error, not insisted on in appellant's argument and brief, will be deemed waived. [Davis v. Barada-Ghio Real Estate Co., 163 Mo. App. 328, 143 S. W. 1108; Lange v. Railway, 115 Mo. App. 582, 91 S. W. 989; Corrigan v. Kansas City, 93 Mo. App. 173; Powell v. Palmer,

Digitized by Google

45 Mo. App. 236; Shaw v. Goldman, 183 Mo. 461, 81 S. W. 1223.] A party is not entitled to be heard on points suggested for the first time in his printed argument and brief in reply which points were not made in his original brief. [Lemser v. St. Joseph Furniture Mfg. Co., 70 Mo. App. 209; Kansas City ex rel. v. Walsh, 88 Mo. App. 271; Lucas v. Cella, 115 Mo. App. 395, 91 S. W. 996.]

It follows from what has been said that the judgment should be affirmed, and it is so ordered. All concur.

---

## MARSHALL C. JOHNSON, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

**Springfield Court of Appeals, April 1, 1912. Motion for Rehearing Denied June 3, 1912.**

1. **RAILROADS: Employee Jumping from Moving Train: Defective Platform: Negligence: Contributory Negligence: Jury Question.** Plaintiff, while employed as head brakeman on a freight train, was injured on jumping from the engine to a station platform while the train was in motion, to get an order for the train. The petition alleged that a defective and decayed piece in one of the planks on the platform caused plaintiff to fall. The defendant set up contributory negligence on the part of the plaintiff in jumping from the moving train when he was not required to do so and when the platform was covered with frost which caused him to slip and fall. *Held*, that the question of defendant's negligence and plaintiff's contributory negligence were for the jury and that the court properly overruled defendant's demurrer to the evidence.

2. **———: Operating Trains: Safe Place to Work.** The work of trainmen, not only while operating trains over the road but at station yards, is regarded as dangerous, even under the most favorable circumstances, and it is incumbent upon the companies to use reasonable care to make the places where they perform their duties as safe as is consistent with the operation of the roads.

Digitized by Google

3. ———: **Employee Jumping from Moving Train: Violating Rules: Jury Question.** In an action against a railroad company for injuries to an employee, a brakeman, who was injured while violating printed rules of the company, which prohibited the employee from jumping on or off trains moving at a high rate of speed, there was substantial evidence that the rules had been abrogated and a conflict as to whether the train was going at a high rate of speed. *Held*, the question was for the jury.

4. ———: ———: **Defective Platforms: Passengers.** When it is considered that the care required should be commensurate with the peril the employee encounters in jumping from moving trains, it may well be said that a platform that was not reasonably safe for a passenger would not be reasonably safe for such employee.

5. **MASTER AND SERVANT: Servant Violating Rules: Master's Acquiescence in Violation.** A servant cannot recover for injuries in consequence of the violation of the master's instructions or rules, unless it be shown that the rules were being violated with the knowledge and acquiescence of the master.

6. **RAILROADS: Employee Jumping from Moving Train: Defective Platform.** Where a railroad company knows that its brakemen, in the performance of their duties, were required to jump on to the station platform from the train, while the latter was in motion, then the condition of its platform is an important factor. The company was bound to know the usual effect of ordinary, natural conditions and to have contemplated that there might at times be frost or ice upon its platform and that on account thereof obstructions or defects in its platform might be more dangerous than at other times.

7. **MASTER AND SERVANT: Servant Selecting Dangerous Method.** An employee cannot hold the master for damages because he was injured while voluntarily doing an act which he knew was dangerous when at the same time a safe way was open and apparent to him.

8. **RAILROADS: Employee Jumping from Moving Train: Servant Selecting Dangerous Method: Jury Question.** Plaintiff was injured while jumping off a moving train to get a train order, the negligence alleged being a defect in the station platform. The evidence disclosed that it was the duty of the engineer to stop the train in case the train crew failed to get the order and defendant contended that plaintiff selected a dangerous way when a safer one was apparent to him. *Held*, that the question was for the jury.

9. **EVIDENCE: Negligence: Subsequent Repairs.** Testimony of subsequent repairs is not admissible to show negligence at the time of the injury.

Digitized by Google

10. ———: ———: ———: **Defective Board.** Where plaintiff claims that a board was rotten at the time he was injured, testimony that it was taken up a week afterwards and was rotten at that time was evidence that it was rotten at the time plaintiff was injured.

11. ———: **Defective Board: Confining Testimony to Defect: Harmless Error.** Where the instructions submitted to the jury the condition of the platform at the very point complained of by the plaintiff, the testimony of a witness, though objectionable for the reason that he did not confine his testimony to the condition of the platform at the point plaintiff was injured, is *held* not to have affected the verdict.

12. **INSTRUCTIONS: Master and Servant: Servant May Presume Place to Work in Safe Condition.** In an action against a railroad company for injuries to a brakeman, who in alighting from a moving train caught his foot in a defective board on a station platform, an instruction which tells the jury that in the absence of knowledge to the contrary, the plaintiff had the right to presume that the platform at the place where he alighted was in a reasonably safe condition, etc., is held proper.

Appealed from Barton Circuit Court.—*Hon. B. G. Thurman,* Judge.

AFFIRMED.

*W. F. Evans* and *Mann, Johnson & Todd* for appellant.

(1) Appellant was not an insurer of its employees and was only required to maintain the depot platform in a reasonably safe condition; the evidence in this case fails to show neglect of this duty on the part of the appellant. Hutchison on Carriers (2 ed.), sec. 521; 4 Elliott on Railroads, sec. 1590; Gunderman v. Railroad, 58 Mo. App. 370; Robertson v. Railroad, 152 Mo. 382; Joyce v. Railway, 219 Mo. 344; Tabler v. Railroad, 93 Mo. 79; Gattis v. Railroad, 153 Mo. 403; Goranson v. Mfg. Co., 186 Mo. 300; Epperson v. Cable Co., 155 Mo. 346; Minnier v. Railroad. 167 Mo. 99; Luceke v. Graham, 123 Mo. App. 212; Lovell v. Railroad, 121 Mo. App. 466; Wendell v. Railroad,

Digitized by Google

100 Mo. App. 566; Warren v. Independence, 153 Mo. 595. (2) Not only did the burden rest upon the plaintiff to affirmatively prove negligence on the part of defendant, but furthermore it rested upon him after proving that defendant was negligent to also prove that defendant's negligence was not only the cause but the proximate cause of his injury. Killion v. Railroad, 86 Mo. App. 473; Cooley on Torts, p. 69; Foley v. McMahan, 114 Mo. App. 442; Kappes v. Shoe Co., 116 Mo. App. 154; Jackson v. Elevator Co., 209 Mo. 506; Reedy v. Brewing Co., 161 Mo. 523; Banks v. Railroad, 40 Mo. App. 464; Waller v. Railroad, 59 Mo. App. 410. (3) Plaintiff testified that before he alighted from the moving train onto the platform he looked and saw that the platform was covered with a heavy frost and saw further that the train was running at a rate of from six to eight miles per hour. His alighting onto said platform under such circumstances amounted to contributory negligence on his part, which would prevent a recovery. Hurst v. Railroad, 163 Mo. 309; Roenfeldt v. Railroad, 180 Mo. 554; Payne v. Railroad, 136 Mo. 562; Kelsay v. Railroad, 129 Mo. 362; Mockowik v. Railroad, 196 Mo. 550; Murphy v. Railroad, 43 Mo. App. 342; Heaton v. Railroad, 65 Mo. App. 479. (4) If there was any substantial evidence that it was plaintiff's duty to get off the train and secure the train order he knew that it was the duty of the engineer to stop the train when the order was missed. Under this condition of facts he had the choice of a safe or unsafe means of performing his duties and when he voluntarily adopted an unsafe way he absolved the defendant from liability. Moore v. Railroad, 146 Mo. 572; Hurst v. Railroad, 163 Mo. 309. (5) Because plaintiff's injuries were the result of disobedience on his part of the printed rules of the defendant company prescribing his duties at the time and place of the injury, with which rule he admitted he was familiar, and for this reason plain-

Digitized by Google

tiff was not entitled to recover. Matthews v. Railroad, 227 Mo. 241; Schaub v. Railroad, 106 Mo. 74. 23 L. R. A. 768; Francis v. Railroad, 110 Mo. 387; Van Camp v. Railroad, 141 Mo. App. 344; Yongue v. Railroad, 133 Mo. App. 158. (6) The court erred in giving plaintiff's instruction No. 7, which told the jury that the plaintiff had a right to presume that the platform at the place where he alighted was in a reasonably safe condition for him to alight. Palmer v. Railroad, 142 Mo. App. 440; Reno v. Railroad, 180 Mo. 483; Nixon v. Railroad, 141 Mo. 439; Bragg y. Railroad, 192 Mo. 331.

*Edwin L. Moore* and *Walter W. Calvin* for respondent.

(1) It was the duty of the appellant to exercise reasonable care to render and maintain its said depot platform in a reasonably safe condition for respondent's use in the performance of his duties. Henry v. Railroad, 109 Mo. 488; Burdict v. Railroad, 123 Mo. 222; Hollenbeck v. Railroad, 141 Mo. 97; Young v. Waters-Pierce Oil Co., 185 Mo. 634; George v. Railroad, 225 Mo. 364; Lee v. Railroad, 112 Mo. App. 372; Garaci v. Construction Co., 124 Mo. App. 709; Brannock v. Railroad, 147 Mo. App. 301; Munro v. Railroad, 155 Mo. App. 710, 135 S. W. 1016; Armour & Co. v. Russell, 144 Fed. 614, 6 L. R. A. (N. S.) 602; Railroad v. Sanders, 11 Am. and Eng. R. R. Cases (N. S.), 862; Southerland v. Railroad, 43 Fed. 646; Jarvis v. Railroad, 128 Mich. 61; Babcock v. Railroad, 150 Mass. 457; Bogenschultz v. Smith, 84 Ky. 580; Railroad v. Vestal, 12 Am. and Eng. R. R. Cases (N. S.), 635; Wichter v. Railroad, 46 Atl. 740. (2) The defective condition of appellant's depot platform was the proximate cause of plaintiff's injury. Bassett v. St. Joseph, 53 Mo. 290; Waldheir v. Railroad, 87 Mo. 37; Brennan v. St. Louis, 92 Mo. 482; Dixon v. Railroad,

Digitized by Google

124 Mo. 140; Vogelsang v. St. Louis, 139 Mo. 127; Smith v. Fordyce, 190 Mo. 1; Musick v. Packing Co., 58 Mo. App. 322; Waters v. Kansas City, 94 Mo. App. 413; Kansas City v. McDonald, 60 Kas. 481, 57 Pac. 123; Wheeler v. Fort Dodge, 131 Ia. 566, 9 L. R. A. (N. S.) 146; Koch v. Williamsport, 195 Pa. 488, 46 Atl. 67; Moore v. Townsend, 76 Minn. 64, 78 N. W. 880; Clinton v. Revere, 195 Mass. 151, 80 N. E. 613; Cole v. Society, 124 Fed. 113, 63 L. R. A. 416; 15 Amer. Dig. Dec., sec. 51, 20 L. R. A. (N. S.) 739. (3) The demurrer to the evidence was properly overruled; and the facts as presented warranted the submission of the issues to the jury. Erickson v. Railroad, 171 Mo. 647; Campbell v. Railroad, 175 Mo. 161; Walker v. Railroad, 193 Mo. 482; Deschner v. Railroad, 200 Mo. 327. (4) Instruction No. 4 given on behalf of the plaintiff properly declared the law; but in no event can appellant complain of error, if any, therein, in view of the instructions asked and given on its behalf. Noble v. Blount, 77 Mo. 235; McGrew v. Railroad, 109 Mo. 582; Spillane v. Railroad, 111 Mo. 555; Burdoin v. Trenton, 116 Mo. 358; Meadows v. Insurance Co., 129 Mo. 76; Anderson v. Railway, 164 Mo. 411; Meiley v. Railroad, 215 Mo. 567; Blaydes v. Adams, 35 Mo. App. 526; Wallich v. Morgan, 39 Mo. App. 469; Pike v. Eddy, 53 Mo. App. 505; Nichol v. Paper Co., 95 Mo. App. 226; Knudsen v. La Crosse Co., 145 Wis. 393, 130 N. W. 519, 33 L. R. A. (N. S.) 223; 19 Am. Dig Dec., sec. 295. (5) Under all the evidence it was a question of fact as to whether or not appellant had in force such a rule as contended for upon the trial hereof, and also, whether or not respondent at the time of his injury was in the performance of his duties pursuant to his employment. Berry v. Railroad, 98 Mo. 62; Francis v. Railroad, 110 Mo. 387; Brady v. Railroad, 133 Mo. App. 141. (6) The question of appellant's negligence and respondent's contributory negligence, as well as all other questions, upon the mate-

Digitized by Google

rial issues were properly submitted to the jury and under appropriate instructions; and no error, materially affecting the merits of this action, appearing those questions should remain conclusive upon appeal. R. S. 1909, sec. 2082; Barkley v. Assn., 153 Mo. 300; Jones v. Railroad, 178 Mo. 528; Peterson v. Transit Co., 199 Mo. 331; Mockowik v. Railroad, 196 Mo. 550; Stump v. Kopp, 201 Mo. 412; Berry v. Railroad, 214 593; Mann v. Doerr, 222 Mo. 1; Hannon v. Transit Co., 102 Mo. App. 216; Woody v. Railroad, 104 Mo. App. 678; Railroad v. Railroad, 110 Mo. App. 300; Caplain v. Transit Co., 114 Mo. App. 256; Cross v. Gould, 131 Mo. App. 585.

GRAY, J.—This is an action for personal injuries suffered by plaintiff at Richland, this state, November 20, 1910. He was head brakeman on a freight train, consisting of thirteen cars and a caboose, running from Springfield to Newburg. As the train approached Richland about nine o'clock p. m. a signal was displayed at the station which indicated there was an order for the train. The signal displayed indicated that the character of the order did not necessarily require the train to stop, but the operator could deliver it to the crew as the train passed the station. The plaintiff was riding on the engine and as the train approached Richland, he stationed himself on the steps of the engine to receive the order as it was handed up by the operator. He failed to get the order as the train passed the depot, whereupon he jumped to the platform and in some way was thrown and severely injured by getting under the train.

The petition alleged the duty and negligence as follows: "That in the course of and as a part of plaintiff's duties, he was required, upon reaching a station where orders governing the movement of said train, were to be taken and received by the crew, to place himself on the steps of the engine cab, and in a

Digitized by Google

place where he could, while said train was in motion, reach said orders as the same would be handed up to him by the telegraph operator, whose duty it was to deliver the same to him; and, in the event that plaintiff would fail to catch said orders from said operator and agent, and if for any reason, he would fail to obtain the same while in said position, then it became and was his duty, in the course of said employment, to immediately alight from said train, procure such orders as were to be delivered to him at said station, and then board said train and deliver the same to the engineer thereon.

"That on said November 20, 1910, and at about the hour of 9:35 p. m., said train upon which plaintiff was working was passing eastward through the town of Richland, and, plaintiff, in order to receive the orders which were to be delivered to him at said station, had placed himself on the steps of the engine cab, on the north side thereof, and on the same side of said engine cab upon which the depot and platform were situated, but by reason of the fact that the operator, whose duty it was to prepare said orders for delivery to plaintiff, failed to have the same ready for delivery to him, and failed to present or deliver the same to plaintiff while he was in his accustomed position on the steps of said engine cab, and waiting to receive the same, while said train was moving past said depot and platform, it became and was necessary for plaintiff, in the furtherance of the duties of his employment, to alight from said engine cab and to obtain said orders and deliver them to the engineer as aforesaid which he thereupon attempted to do, and as he alighted therefrom to and upon the depot platform, while said train was still in motion, the heel of the shoe upon his left foot caught in a hole and decayed place in the plank or planks of said platform, by reason of which he was thrown forward and southward to and against the train and caused to fall between

Digitized by Google

said platform and said moving train, and was struck by the journal boxes and axles on the trucks of said train, and sustained lasting and permanent injuries."

The answer was a general denial and a plea of contributory negligence. The plea of contributory negligence consisting of an allegation that plaintiff received his injuries in voluntarily jumping from the engine when and where he was not required to do, and that it was negligence for plaintiff to jump from the moving engine when he knew, or by the exercise of ordinary care, could have known, that the platform was covered with frost, and on account thereof, he was likely to slip and fall, and it was dangerous for him to jump on said platform under said circumstances.

The cause was tried before a jury, resulting in a verdict for $6000, and defendant appealed.

The first assignment of error is, that the court erred in refusing the appellant's demurrer at the close of the evidence.

The plaintiff testified that he was twenty-nine years of age, and had been railroading for ten years; that he had been running between Springfield and Newburg for two years previous to the time he was injured; that his work was on through freights which did no switching, and only stopped for orders and to meet and pass other trains; that on the night of his injury, he was the head brakeman, and reached Richland about 9:30 p. m.; that the train crew consisted of an engineer, fireman, conductor, rear brakeman and the plaintiff; that as they approached Richland, an order signal was out; that orders were known by their numbers, and that the signal denoted that a No. 19 order was to be delivered and which was supposed to be delivered by means of a hoop while the train was passing the station.

The following questions and answers are also found in plaintiff's testimony:

Digitized by Google

"Q. Now, on the night in question, you say the operator indicated the order was to be taken at Richland? A. Yes, sir.

"Q. What did you do at that time? A. I immediately got in position to catch the order, as was my duty and was accustomed to.

"Q. Did you receive that order? A. No, sir, I didn't. There was nobody there with an order.

"Q. What did you then do following that? A. I made preparation to get off just as quick as I could.

"Q. Describe to the jury what you did? A. Then I changed my lamp to my left hand, turned around with my back from the engine and my face towards the engine, and squared myself on the steps so as to swing off with my left foot.

"Q. As you got in that position just tell the jury what you then did? A. I lit on my left foot, and I slid about two or three feet, if I can remember. Then my left foot struck something like a hole, which caught the heel and held it there. Then my right foot—I put my right foot down just a little bit ahead of the left foot, and the force of the motion of the train leaned me forward, of course—pushed me forward, and being bent over in that position, and leaning towards the train the corner of the car commenced striking me in the shoulder; the force of the car striking me loosed my heel—I found afterwards it had torn off the heel of my shoe; then it carried me with the train.

"Q. Now, Mr. Johnson, tell the jury what your duties were as head brakeman, with reference to nineteen orders? A. My duties were, if I was on the engine and a nineteen order was to be handed on, to catch that order; and in case the order was not delivered, or missed by the engineer—if I were not on the engine and some of the engine crew attempted to get it and in any way failed to get it, then it became my



Digitized by Google

duty to alight from the train and procure that order and bring it to the engineer.

"Q. Getting back on the train, of course? A. Yes; and get back on the train and deliver it to the engineer.

"Q. Would the train stop at those times? A. No, sir.

"Q. State whether you have performed those things in that manner before this injury? A. I did; yes, sir.

"Q. For how long a time? A. Ever since I have been in the service of the company.

"Q. What were your duties as to where you was to ride at that time? A. Upon the engine.

CROSS-EXAMINATION.

"Q. The book of rules is a volume like that, isn't it? A. Yes, sir.

"Q. It was your duty to familiarize yourself with the rules, and you are familiar with the rules, are you not? A. Yes, sir.

"Q. The company requires that you take and familiarize yourself with the rules? A. Yes, sir.

"Q. Now, all the information that you had about your duties you got out of this book, didn't you? A. Yes, sir.

"Q. There is no other—the company had no other method of instructing you in your duties, excepting as to this book? A. Oh, yes; they have. They have bulletins in the assistant superintendent's office where brakeman are examined.

"Q. They give you a copy of the bulletin and post it in the assistant superintendent's office? A. Yes, sir.

"Q. There is no other source of delivering rules to you by which you are to be governed in the operation of trains? A. No, sir; not that I know of.

Digitized by Google

"Q. I will ask you if you are familiar with rule 427, which reads: 'When approaching stations, junction points, draw-bridges, railroad crossings, water or coal stations, and while descending heavy grades conductors of all freight, mixed or work trains will require their brakeman to be out on top for one-half mile and until train comes to a full stop or has passed such point.' You were familiar with that rule? A. No, sir; it had never been practiced on the Frisco.

"Q. Don't you recollect of having seen that rule? A. No, sir; I don't recollect of ever reading it.

"Q. I will ask you to state if you remember this further paragraph? 'On trains fully equipped with air, front and rear brakeman should take position on high cars, dividing as nearly as possible the distance between engine and caboose. Where there are non-air cars, one of the brakeman must take position immediately behind the rear air brake car.' Do you remember that? A. Yes, sir; but those rules only applied on Dixon Hill and such like, on grades.

"Q. Were you familiar with that rule? A. Yes, sir. It applied to Dixon Hill and grades. It is not customary of practice of railroad company for a brakeman to ride on top any point only at Dixon Hill.

"Q. Doesn't it regulate it on approaching stations? A. No, sir.

"Q. I will get you to read rule 631? A. Each employee is required to be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows. . . . The company does not require or expect its employees to incur any risk, from which, by the exercise of their judgment and by personal care, they can protect themselves, but enjoins upon them and demands that they shall take time and use the means necessary to, in all cases, do their duty in safety.'

"Q. I will get you to read rule 637? A. 'Employees are forbidden to stand on track and jump on

Digitized by Google

engine or cars as they approach them, and are warned not to jump on or off trains or engines moving at a high rate of speed, or to follow other dangerous practices.'

"Q. I will get you to read rule 204? A. 'Train orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Those for a train must be addressed to the conductor and engineer, and also to anyone who acts as its pilot. A copy for each person addressed must be supplied by the operator.'

"Q. I will get you to read rule 211? A. 'When a nineteen order has been transmitted, the operator, when it is completed, shall personally deliver a copy to each person addressed without taking his signature.'

"Q. Is there anything in the book of rules that says you should ride in the engine? A. I don't know as there is.

"Q. You say it was your duty to catch this nineteen order. Please turn to the book of rules and show where that is made the head brakeman's duty? Is there any such rule in the book? A. I don't know whether there is or not. I know that they have got it to do and if they don't do it they get disciplined for it.

"Q. You say it was your duty, should the attempt to get the nineteen order fail, it was your duty as head brakeman to get off and get it? A. Yes, sir.

"Q. Turn to the rule that makes it your duty? A. Them rules are not made by the book; they are bulletins issued by the assistant superintendent that a brakeman should do these things.

"Q. Mr. Yoakum was the assistant superintendent? A. Yes, sir.

"Q. He issued a bulletin making it your duty to ride in the engine? A. I don't know if he did. I know we were supposed to do it, or had to do it.

Digitized by Google

"Q. You say there is a bulletin issued that it is the head brakeman's duty to get nineteen orders? A. I don't know if there is a bulletin to that effect or not.

"Q. Then in reference to bulletins you don't mean you got any authority from a bulletin to do those things? A. I merely meant I did as others did, as it was the custom and practice.

"Q. Then it wasn't according to rules, but according to what you considered the custom and practice? A. If each and every employee would live up to the book of rules it would be impossible to move trains from one station to another.

"Q. You think so? A. I know it.

"Q. Then you don't pretend to be governed by the book of rules and the bulletins? A. The book of rules, you are not supposed to live up to every one. It would be impossible to move trains and railroads.

"Q. So you knew when you was riding in the engine that you were violating the rules in the rule book and bulletins? A. I don't; for I had rode on the engine in the presence of officers on the train.

"Q. Who were the officers? A. I don't remember now.

"Q. What about this duty that you allege in your petition and you testify, is your duty to jump off and get that nineteen order? Where do you get that? A. I got it from every other practical railroad man that does it.

"Q. You don't get it from the rules or bulletins? A. As I said before, we don't live up to the book of rules.

"Q. You knew you were not acting according to rules when you jumped off? A. I didn't know I was doing anything contrary.

"Q. Nobody told you to get that nineteen order? A. Nobody told me.

Digitized by Google

"Q. Did anybody ever tell you to get one? A. Yes, sir; I have been told time and again to catch that order-brakeman, 'catch that order.'

"Q. Volunteered. When you missed it who told you to get off? A. I don't know as I was told at all. I knew it was my duty, and I didn't wait to be told.

"Q. You knew the rules required the engineer to stop if he failed to get the order? A. I knew he was supposed to stop if he failed to get the order. The rules don't require him to stop if I would get off and get the order and deliver it to him—don't require him to stop.

"Q. As I understand you, when you got off on the platform you say your left foot slipped about three feet and there is where your heel caught? A. Yes, sir.

"Q. Tell the jury what kind of place your foot caught—got fast in? A. I couldn't state; but I know the foot was fast; the heel pulled off my left shoe; caught and held me there until I was knocked loose by the train.

"Q. How fast was that train going when you got off? A. About six to eight miles an hour.

"Q. You did know while yet on the engine, and before you got on the platform, it was covered with frost? A. Yes, sir. I discovered that when I got ready to get off, when I swung the lantern to look for trucks or other obstructions."

P. H. Staggs, who examined the platform immediately after the accident, testified as follows: "He lit on his left foot, and the second step there seemed to be kind of a doty place, rotten, you know, like on the edge of the plank where it would rot, and just like as you know it would wear out. I seen where he had stepped, and I tried with my foot to see if a person's heel would catch in it, and it would catch enough to catch a person. He got off about ten feet from this

Digitized by Google

doty place. I don't know how deep the hole was, but a person's feet could catch in it for I tried it. I know in reason if he hadn't stepped in the hole he would not of fell. I know this because I have gotten off and on trains enough to know in my own judgment."

D. W. Adkinson for plaintiff, testified as follows: Q. "State the condition of the platform of that place before he was hurt? A. Well, the cracks was something like an inch and a half wide, and the boards where the mark stopped was sloped off, it wasn't sound. I took my knife and gouged in it and it wasn't very sound."

I. W. Hurt testified that the platform had rotten places in it; that back from the place where plaintiff's heel struck, for about an inch and a half, the plank was rotten.

It is true the defendant offered several witnesses who contradicted the testimony of the plaintiff regarding his duties, and also contradicted the witnesses who testified for him regarding the condition of the platform. It may be said, however, that all the testimony disclosed that the brakeman were in the habit of receiving No. 19 orders, but the testimony of plaintiff stands alone in support of the proposition that it was his duty to get off the train and get the order and get back on the train while it was in motion.

The defendant did not stand on the rules as printed, but offered several witnesses who testified to the custom and practice in receiving and delivering No. 19 orders.

The appellant claims that its demurrer should have been sustained: (1) That the platform was in a reasonably safe condition; (2) That the plaintiff, at the time he was injured, was disobeying the rules of the company; (3) That he was guilty of contributory negligence, as a matter of law.

In Henry v. Railroad, 109 Mo. 488, 19 S. W. 239, it is said: "A railroad corporation owes to those of its

Digitized by Google

employees who are engaged in running its trains the duty of great care and vigilance in providing and maintaining a safe and unobstructed track. The care in this particular should be commensurate with the perils the employee would encounter should the company fail in the proper observance of this duty."

If the plaintiff's testimony is true, then it was his duty to jump on to the platform from moving trains at night, as well as by day, and to again board such trains from such platforms at such times. Service of trainmen, not only while operating trains over the roads, but at station yards, is regarded and recognized as dangerous, even under the most favorable circumstances, and it is incumbent upon the companies to use reasonable care to make the places where they perform their duties, as safe as is consistent with the operation of the roads. In the handling of cars and trains about yards and platforms, the employees necessarily move with quickness and celerity from point to point, and hence, it is quite impossible for them, in every instance, to carefully survey their paths or give close attention to the planting of each foot.

The plaintiff testified that on account of the condition of the platform, the heel of his shoe caught and threw him. There was other testimony to the effect that while there was only a depression of a fourth of an inch, yet the board was rotten, and in such a condition that one's foot might be caught in it. It might be said that so far as ordinary pedestrians are concerned, the proof of such a defect would not make a case, but such a defect in a platform up on which trainmen are required to leap in darkness, and while their trains are in motion, cannot be held reasonably safe as a matter of law.

In Munro v. Railroad, 155 Mo. App. 710, 135 S. W. 1016, the defect in the station platform was somewhat similar to the one at Richland, and the court held that the evidence regarding the same was sufficient to jus-

Digitized by Google

tify submitting the question of the condition of the platform to the jury. In that case the plaintiff was not an employee, but a passenger, and the case was determined by the law governing that relation, but when we consider that the care required should be commensurate with the peril the employee encounters in jumping from moving trains, it may well be said that a platform that was not reasonably safe for a passenger, would not be reasonably safe for such employee.

In Williams v. Railroad, 119 Mo. 316, 24 S. W. 782, it is said: "The duty of a railroad company, in respect to keeping its tracks and grounds in a safe and suitable condition, must be a relative one, dependent upon the purposes for which they are used, and the duties required of employees upon them. In yards where trains are made up and much switching done, and in which switchmen are constantly exposed to dangers, a greater degree of care is required than at points on the road where such duties are rare. The duty of the master should be measured and determined by the uses to which premises are applied."

We are of the opinion that the question whether the platform was reasonably safe was for the jury.

The next question is: Was the plaintiff injured while violating the rules of the company? In Matthews v. Railroad, 227 Mo. 241, 126 S. W. 1005, it is said: "It is sufficient to say that it is no longer an open question in this state that, when an employee is injured in consequence of the violation of the master's instructions, the law will not permit a recovery, for the reason that by so doing the servant assumes all the risks which are incident thereto, and must suffer without compensation all injuries sustained by him in consequence of said assumed risks, except in those cases where the evidence shows that the rules of the master were being violated by the servant with the

Digitized by Google

knowledge and consent of the master, or with knowledge and without objection on his part."

The rules prohibited the employees from jumping on or off trains or engines moving at a high rate of speed. There was a conflict in the testimony as to the rate the train was moving. The plaintiff testified that it was moving from eight to ten miles an hour, and the defendant's witness, from twelve to fifteen. And there was also a conflict as to what would be a "high" rate of speed.

In Hurst v. Railroad, 163 Mo. 309, 63 S. W. 695, it is said: "The evidence showed that an experienced brakeman could safely get on the cars in motion while going from ten to twelve miles an hour. . . . The rules of defendant forbade employees 'to board engines or cars while they are in too rapid motion,' thus by implication at least permitting them to do so, when they were not so running."

It is claimed by the defendant that plaintiff should have been riding on top of a box car as the train passed through Richland, and that it was no part of his duties to be in the engine, or to receive the order. Reference to plaintiff's testimony as copied herein, will show that he testified it was the practice of the head brakeman to ride on the engine. In this he was corroborated by some of the defendant's witnesses, who testified that the head brakeman rode a part of the time on the engine, and that they also frequently received the No. 19 order; that sometimes the order was delivered to the engineer, sometimes to the fireman, and sometimes to the head brakeman.

The plaintiff testified further, however, that if he failed to get the order while on the engine, it was his duty to jump off the train, obtain it and get on the train again while it was passing through the station. The only corroboration of his testimony on this point is found in the testimony of Mr. Gorman, the train conductor, who testified as follows, on cross-examina-

Digitized by Google

tion: "Q. You mean the man that catches at the order will holler if he gets it? A. He says, 'All right.' Q. If he says 'All right' he don't slow up? A. If he don't holler 'All right' he has got to stop. Q. Whoever catches it, brakeman or fireman, signals to him he has it? A. Yes, sir. Q. In case it is lost his practice is to stop? A. Yes, sir. Q. I will ask you if it is not the practice also, and very generally observed, that his train is kept under more control and a man alights and goes off the train and gets an order? A. Yes, sir. Q. And you get yours when the caboose comes by? A. Yes, sir."

If the plaintiff's testimony, to the effect that it was the regular practice and custom for the brakeman to get off the train and get the order and get back on and deliver it to the engineer, is true, then there was some substantial evidence that the rule had been abrogated.

In Barry v. Railroad, 98 Mo. 62, 11 S. W. 308, the rule is stated in the following language: "The position taken by the appellant that Barry should be held guilty of contributory negligence on a demurrer to the evidence because violating rule 41 at the time of the accident, is untenable. If there was an established usage on the part of the defendant's engineers, known and acquiesced in by the superior officers, to allow fireman to make short moves, the engineer not at the time being on the engine, then Barry could not and ought not to be held guilty of contributory negligence. Under these circumstances, the custom would amount to an abandonment of the rule by the defendant to the extent of the custom. But it is further insisted that there is no evidence that the superior officers knew of the existence of such a usage. Knowledge of the usage need not be shown by direct evidence that these officers saw the custom practiced. Notice may be inferred from circumstances. It may be implied from the notoriety of the custom. The evi-

Digitized by Google

dence in this case tends to show that the usage was well known among the defendant's employees and of long standing, and from this the jury could with propriety infer notice to the defendant's officers.

If we look only to plaintiff's testimony, and we are limited thereto, in discussing the question of a demurrer to his evidence, then under the authority of the case just cited, he was entitled to have the jury say whether the rule was in force, or whether it had been abrogated.

As the plaintiff's testimony showed, that when he cast his light on to the platform, for the purpose of seeing if it was free from obstruction, he saw that it was covered with frost, it is claimed that by jumping from the train on to the platform, he was guilty of such contributory negligence as to preclude a recovery. Had he known that the platform was defective, there would be much force in this contention.

In Brannock v. Railroad, 147 Mo. App. 301, 126 S. W. 552, it is said: "In Lake Erie, etc. Co. v. Craig, the question whether a trainman who was injured by catching his foot in an open frog, had proximately contributed to the accident by needlessly going between cars, was ruled to be for the jury on the ground that if he went between carelessly, nevertheless he did not take the risk of injury from the frog, because he had no notice, actual or constructive, it was open, hence might count on the railway company having complied with its duty to block it. . . . Ability to anticipate by ordinary forethought that harm is likely to result from the wrongful conduct of another, if one does a given careless act, is material on the question of whether said act is superseded as proximate cause of the ensuing harm. If the act of carelessness is performed knowing, or with good reason to know, it exposes the actor to injury from another's tort, and injury follows, the first carelessness remains a concurrent and proximate cause."

Digitized by Google

In Baird v. Railroad, 61 Iowa 359, 13 N. W. 731, the plaintiff undertook to make a coupling of cars under circumstances more dangerous than usual, and was injured in the attempt, but the court held this fact was not conclusive proof of his contributory negligence. In the course of the opinion the court said: "It is true that the jury in this case found that there was more than usual danger, by reason of the fact that the car to which plaintiff was to couple was not stationary. But their finding must mean, we think, that it was more dangerous than it would have been if the car to which he was to couple had been stationary. The mere fact alone that the car was in motion, regardless of the speed with which it was moving, would not necessarily make the coupling more dangerous than an ordinary one. But if it should be conceded that the jury meant that the coupling in this case, in view of all the circumstances shown, was more dangerous than an ordinary one, it would not necessarily follow that the plaintiff was guilty of contributory negligence. Nearly all employment in making up and running railroad trains is more or less hazardous. In performing a duty which necessarily involves a large hazard, the employee should of course exercise greater care. But we cannot say that the employee might not under some circumstances be justified in taking more than the ordinary risk. Risks differ according to circumstances, and the circumstances are sometimes very complicated, and not always to be apprehended and estimated in a moment by the employee while intent upon the performance of his duty. The ordinary rule is that the employee should exercise such care as a prudent person might reasonably be expected to exercise in view of all the circumstances of the particular case, so far as they are known to him, or are discoverable in the exercise of property diligence.

"The plaintiff was walking westward between the rails, just in advance of the train backing westward,

Digitized by Google

and close by the drawbar, intending to raise the link so as to effect a coupling when the cars should come together. But seeing that the car to which he was to couple was moving toward him, he concluded not to remain until the cars came together, and attempted to step out. He might and, as the circumstances were, he should have come to this conclusion sooner. Had he done so, he would manifestly have succeeded. But just ahead of him was a ditch which was liable to cause him to stumble, and which did cause him to stumble. Had he seen it, or had he known that there was a ditch there, there would be much ground for contending that he was guilty of contributory negligence. But it does not appear that he saw the ditch, or knew that it was there."

If the appellant knew that its brakeman, in the performance of their duties, were required to jump onto the platform from the train while the latter was in motion, then the condition of its platform was an important factor. And it was bound to know the usual effect of ordinary, natural conditions, and to have contemplated that there might, at times, be frost or ice upon its platform, and that on account thereof, obstructions or defects in its platform might be more dangerous than at other times. [Benedict Pineapple Co. v. Railroad, 46 So. 732, 20 L. R. A. (N. S.) 92, and note thereto.]

The plaintiff was an active young man, twenty-nine years of age, and in possession of all his faculties, and able to take care of himself under any ordinary circumstances, and when these things are all considered, together with the fact that it is not claimed he knew, or would have known by the exercise of ordinary care, of any defect in the platform, we cannot say, as a matter of law, that he was guilty of contributory negligence by jumping from the moving train onto the platform, simply because he knew of the frost.

Digitized by Google

The appellant says, however, that the plaintiff knowingly selected a dangerous way, when a safer one was apparent to him, and on account thereof, was guilty of contributory negligence. The evidence does disclose that if for any reason the train crew failed to get the No. 19 order, it was the duty of the engineer to stop the train and get the order, and it is the contention of the appellant that when the respondent saw frost on the platform, that he was then given the option to jump from the train or wait for it to stop, and as he voluntarily chose the former, he assumed all the risks relating thereto. This rule is declared in Moore v. Railroad, 146 Mo. 572, 48 S. W. 487, and is a familiar one, based on common sense, as no employee who knowingly selected a dangerous way when a safer one was apparent to him, has any right to hold the master for damages because he was injured while voluntarily doing an act which he knew was dangerous, when at the same time a safe way was open to him. This question, however, like nearly every other question of negligence, is seldom one of law.

In Florida R. R. Co. v. Mooney, 24 So. 148, it is said: "If, in the performance of his duties, two or more methods are open to him, and he has no instructions to pursue one in particular, he necessarily must choose between them, and he cannot be said to have been negligent if he in good faith adopts that which is more hazardous than another, provided the one pursued be one which reasonable and prudent persons would adopt under like circumstances. Any other rule would require the servant to be measured by the standard of very prudent persons, for only extremely cautious persons ordinarily adopt the least hazardous course where both are considered safe and appropriate. For this reason it cannot be held, as a matter of law, that, in all cases where a servant is injured while pursuing a method voluntarily adopted by him, more hazardous than other available methods, he is guilty

Digitized by Google

of contributory negligence, for nonconstat the method pursued may be one which prudent persons would ordinarily exercise under like circumstances." To the same effect is the case of Brady v. Railroad, 206 Mo. 509, 102 S. W. 978.

In Albion v. Hetrick, 90 Ind. 545, 46 Am. Rep. 230, it is said: "It is only when the standard of duty is fixed and certain, or where the measure of duty is defined by law, . . . or when the negligence is so clear and palpable that no verdict could make it otherwise, that the question of negligence becomes one of law, and not of fact." And the rule is thoroughly established in this state that the question of negligence is one of fact where reasonable minds might differ as to the ultimate inference to be drawn. And it may also be said that judges are not supposed to know anything more about the proper manner of performing the brakeman's duty than jurors. For this court to say, as a matter of law, that the plaintiff was guilty of contributory negligence, such as to preclude a recovery because he jumped onto the platform under the circumstances, would, in our opinion, be usurping the province of the jury.

The second assignment of error relates to the action of the court in admitting certain testimony. Omer Shelley, a witness for plaintiff, testified that in September, October and the first part of November, 1910, there were several broken places, holes and rotten boards in the platform. The objection was made that the testimony did not prove the condition of the platform at the time and place of the injury. The witness further testified that he did not recall the condition of the platform where plaintiff claimed he was injured, and that he did not know whether at such place there were any broken boards or holes in the platform. He also testified that at a point about 150 feet east of the depot, there were three new boards in the platform.

Digitized by Google

I. W. Hurt testified that about a week or ten days after the accident, he removed from the platform at the point where plaintiff was injured, some of the boards, and there were rotten places in them; that at the place where plaintiff's heel struck, the plank was rotten, and this rotten place was right where the plaintiff's heel or something had struck.

D. W. Adkinson testified that in October and November he examined the platform, and that some of the boards had rotten edges and there were a few that had been spliced. This testimony was also objected to on the ground that defendant did not confine the inquiry as to the condition of the platform to the time and place of the injury. The witness further testified that he was at the platform the next morning and saw where a man had slipped, and also saw the blood, and that the frost was still on the platform, and from the marks and blood he knew where the plaintiff had fallen and that at such point the plank was not sound.

The objection made to the testimony of the witness, Hurt, was that it related to repairs made subsequent to the time of the injury, and that it was not shown that at the time said repairs were made the platform was in the condition it was in at the time of the alleged injury. The court ruled that testimony that the platform was repaired after the injury, was not admissible, and struck out that part of the questions and answers of the witness tending to show that boards were replaced, leaving the balance of the testimony remaining.

It may be conceded that testimony of subsequent repairs is not admissible to show negligence at the time of the injury. [Alcorn v. Railroad, 108 Mo. 81, 18 S. W. 188.] And the record discloses that the trial court was so governed in its ruling. It must be remembered however, that it was the claim of plaintiff that the board was rotten at the time he was injured,



Digitized by Google

and testimony that it was taken up a week afterwards and was rotten at that time, was evidence that it was rotten at the time plaintiff was injured. [Swadley v. Railroad, 118 Mo. 268, 24 S. W. 140; Landers v. Railroad, 156 Mo. App. 580, 137 S. W. 605.]

In the Swadley case the plaintiff claimed the defendant was guilty of negligence in permitting rotten and decayed ties to remain in its roadbed. A witness testified that he examined the ties about the first of August, and they were rotten, and the injury occurred the first of the following September. In sustaining the trial court in admitting the testimony, Judge BLACK said: It was not necessary that the witnesses should be able to speak of the condition of the ties on that very day. Evidence of the condition of the ties within a reasonable time before or after the accident was competent. The limitation to such evidence is that it must be such, in character and point of time, as to justify the inference that the ties were in a bad condition at the time of the accident." The court cited, in support of its opinion, Stewart v. Everts, 44 Am. and Eng. R. R. Cases, 313, wherein it was held that evidence, that when the road was repaired six months after the accident, it was found that the ties were in such a state of decay as to fairly lead to the conclusion that they were in a decayed state when the accident happened, was admissible.

While the testimony of the witness, Shelley, was objectionable, for the reason that he did not testify to the condition of the platform at the point plaintiff was injured, yet he did testify that he did not know its condition at that point, but testified that for sometime previous to the time plaintiff was injured, there were rotten or decayed places in the platform. The instructions only submitted to the jury the condition of the platform at the very point complained of by plaintiff, and we do not see how the testimony could in anywise have affected the verdict.

Digitized by Google

The last assignment relates to the action of the court in giving plaintiff's instruction No. 7. The part of the instruction complained of, reads: "The court instructs the jury that, in the absence of knowledge to the contrary, the plaintiff had the right to presume that the platform, at the place where he alighted, was in a reasonably safe condition for him to alight thereon, from said train, while the same was in motion, for the purpose of securing said order, provided you find the securing of said order, under the circumstances, as shown you by the evidence, was in accordance with and within the line of his duties under his said employment."

The objection to the instruction is, that plaintiff was a witness in his own behalf, and testified to the conditions that surrounded him at the time he alighted on the platform, and with this testimony it was error for the court to tell the jury that notwithstanding such knowledge, he could disregard it and lean on the presumption that the platform was safe.

Counsel cite Mockowik v. Railroad, 196 Mo. 550, 94 S. W. 256, in support of their position. In that case Judge LAMM said: "But will the law indulge presumptions where all parties to the actual occurrence are alive and go upon the stand and the facts are fully disclosed? If plaintiff knew of the ordinances and relied on the fact that defendant was obeying their provisions and acted on that reliance, could he not have said so? Under such conditions, reliance would seem to be a fact susceptible of proof as are other facts, and should be proved by the best evidence of which the case would admit. That presumptions have no place in the presence of the actual facts disclosed to the jury, or where plaintiff should have known the facts had he exercised ordinary care, is held in many cases."

It will be noticed that the court did not tell the jury in instruction No. 7, that the plaintiff had the

Digitized by Google

right to presume that the platform was in a reasonably safe condition, but "that in the absence of knowledge to the contrary, the plaintiff had the right to presume," etc. In the Mockowik case the court further said: "It may be said this is not a case where the accident happened in the nighttime and where plaintiff could not see and advise himself by the exercise of ordinary care of the presence, let alone the speed of the engine."

In Heberling v. Warrensburg, 204 Mo. 604, 103 S. W. 36, the court said: "If plaintiff knew of the unsafe condition of the sidewalk at the point where the accident occurred, he had no right to presume that it was in a condition reasonably safe for the use of the public." In the same case the court quoted from Coffey v. Carthage, 186 Mo. 585, 85 S. W. 532, as follows: "If plaintiff had no knowledge of the defect or hole in the sidewalk, then she had the right to assume that the sidewalk was in a reasonably safe condition," and approved this declaration in the following language: "This is, we think, a correct statement of the law."

The case of Heberling v. Warrensburg is a later case than Mockowik v. Railroad, and expressly holds that it is not the duty of a person traveling on a public street to examine it for defects, but he may act upon the presumption that it is reasonably safe. The same rule must be applied in an action by the servant against the master. In fact, no other rule would be reasonable. The instruction is fully supported by Coffey v. Carthage, and Heberling v. Warrensburg.

Appellant also contends that the instruction told the jury that plaintiff had the right to presume that the ice and frost he saw on the platform were not slick and would not cause him to slip and fall. We do not believe the instruction is subject to this criticism, for the reason that it only permitted plaintiff to rely on presumption when he had no knowledge to the con-

Digitized by Google

trary, and the evidence showed conclusively that plaintiff did know of the ice and snow, and therefore, it cannot be said that the instruction authorized the plaintiff to presume the ice and snow were not slick and would not cause him to slip and fall. It appears to us that the part of the instruction objected to referred only to the condition of the platform complained of by plaintiff, and did not refer to ice or snow at all.

In behalf of the defendant the jurors were told that plaintiff could not recover unless he had shown by the greater weight or preponderance of the evidence that there was a hole or decayed place in the platform, and that such hole or decayed place caused him to fall by reason of his heel catching therein. And if the jury were unable to determine from the evidence whether his fall was caused by reason of his heel catching in a hole or decayed place, or from slipping on a frosted platform, or from any other cause, the verdict must be for the defendant, and if the jury found that the platform was covered with frost and on account thereof, was slippery, and that when plaintiff alighted from the engine upon the platform, he slipped and his slipping caused him to fall and receive his injuries, he was not entitled to recover.

Having examined the assignment of errors, and determined them against the appellant, it is our duty to affirm the judgment, and the same is accordingly done. All concur.

Digitized by Google

# JOSIE COVELL, Respondent, v. THE WESTERN UNION TELEGRAPH COMPANY, Appellant.

**Springfield Court of Appeals, May 6, 1912. Motion for Rehearing Denied June 3, 1912.**

1. **TELEGRAPH COMPANIES: Action for Penalty: Notice: Sufficiency of Notice of Claim.** In an action against a telegraph company to recover the statutory penalty for failure to transmit and deliver a message, the answer set up a failure on the part of the plaintiff to present her claim to the defendant within sixty days, in accordance with the stipulation printed on the back of the blank on which the telegram was written. The evidence is examined and *held* sufficient to show that plaintiff gave the notice as required by the stipulation.

2. **NOTICE: Burden of Proof.** The defense of a failure to give notice is an affirmative one and the burden is therefore ordinarily on the defendant.

3. **ESTOPPEL: Pleading: Notice: Telegraph Companies.** Where the telegraph blanks used for sending messages contained the name of C, as president and general manager of defendant, and the local agent of defendant informed plaintiff's attorney that C was the proper person to write to with reference to a claim for failure to deliver a message, *held*, that plaintiff was authorized to mail her notice to C relative to such claim and in compliance with the stipulation printed on the back of said message blank, and in such case where defendant shows that C was not its general manager at the time, it is not necessary for plaintiff to plead estoppel.

4. **EVIDENCE: Practice: Admitting Incompetent Evidence: Objections.** Although the evidence admitted is hearsay and incompetent, yet where it is admitted without objection, its weight is for the jury.

5. **NOTICE: Mailing Addressed Letter: Presumption.** The fact that a letter was sent duly addressed and stamped, is evidence that it was received by the addressee.

6. **———: ———: Street Address: Presumption: Telegraph Companies.** Although ordinarily where a letter is sent to a person in a large city in order to raise the presumption that the letter was received, by showing that it was sent duly addressed and stamped, it should also be shown that the address contained the street and number where the addressee resided, yet where the location of the person or firm addressed

Digitized by Google

is well known in the city, as would be the Western Union Telegraph Company, it is not essential to prove that the letter contained the street and number of the addressee.

7. **APPEAL AND ERROR: Evidence: Admitting Incompetent Evidence: Objections.** Where appellant contends that certain evidence should not have been admitted by the trial court, it will be confined to objections made at the time of the introduction of such evidence and will not be permitted in the appellate court to offer additional objections.

Appeal from Laclede Circuit Court.—*Hon. L. B. Woodside,* Judge.

AFFIRMED.

*Geo. H. Fearons* and *A. W. Curry* for appellant.

(1) Defendant's peremptory instruction at the close of the plaintiff's evidence should have been given, because no presumption arose that defendant received any notice of claim within sixty days. Best v. Ins. Co., 68 Mo. App. 598; Ins. Co. v. Hargrove, 116 S. W. 256; Trezevant & Cochran v. Powell & Co., 130 S. W. 234; Drill Co. v. Lindquist, 114 N. W. 1098; Railroad v. Bank, 174 Fed. 923; Postal Laws and Regulations, chap. 6, sec. 636. (2) The question of estoppel did not arise either in the pleadings or in the evidence and was not before the court. Werner v. O'Brine, 40 Mo. App. 483; Railroad v. Curtis, 154 Mo. 10.

*I. W. Mayfield & Son* for respondent.

(1) Defendant's answer filed in this case makes the question of plaintiff's compliance with the stipulation of notice on the back of defendant's message blank an issue of fact. The trial court found as a matter of fact such notice had been served and this being an action at law, its findings will not be disturbed, unless an abuse of discretion. State ex rel. v. Fidelity Co., 236 Mo. 375. (2) What was due diligence to be exercised by defendant's agent, after receiving

Digitized by Google

the message was a question of fact for the court, as any other fact. Jones on Telegraph & Telephone Companies, sec. 511; Telegraph Co. v. Cooper, 71 Texas 507, 9 S. W. 598; Coit v. Western Union, 130 Cal. 657, 53 L. R. A. 678. (3) Proof of defendant's delay in not delivering the message promptly after receiving same, made a prima facie case for the plaintiff, and the defense set up by defendant of failure to notify within sixty days was an affirmative defense and should have been proven by defendant; plaintiff did not have to prove compliance with such stipulation in order to recover. Kendall v. Western Union, 56 Mo. App. 196; Smith v. Western Union, 57 Mo. App. 259. (4) The trial court properly declared the law. Best v. Ins. Co., 68 Mo. App. 598; Cromwell v. Ins. Co., 47 Mo. App. 112.

GRAY, J.—Plaintiff instituted this action to collect the penalty prescribed by section 3330, Revised Statutes 1909. The message was sent from Webb City, December 30, 1910, addressed to W. C. Simpson, Stoutland, this state, and plaintiff made a prima facie showing of negligence on the part of the appellant in handling the same.

The answer alleged that the telegram was written on a blank containing the following stipulation: "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission." It was further alleged that plaintiff failed to present her claim as she was bound to do under said stipulation. The case was tried before the court without a jury, resulting in a judgment in favor of the plaintiff, and defendant appealed.

The real question on this appeal is whether plaintiff failed to give the notice required by the stipulation. The defense of failure to give notice is an

Digitized by Google

affirmative one, and the burden therefore is ordinarily on the defendant. [Kendall v. Telegraph Co., 56 Mo. App. 192.] But it appears that plaintiff assumed this burden and offered the proof relating thereto, and the question now is, was the evidence sufficient to carry the issue to the jury?

Plaintiff's evidence tends to prove that she employed the law firm of Mayfield & Son, of Lebanon, Mo., to collect the penalty. It appears from the testimony of I. W. Mayfield that he inquired of the appellant's general agent at Lebanon as to the proper person and place to address a letter giving the notice of the claim, and was told to write to R. C. Clowry, General Manager of Western Union Telegraph Company, New York; that on January 7, 1911, his firm did write a letter giving notice of the claim. The witness produced a copy of the letter, and testified that he mailed the original, properly stamped and addressed, as instructed; that he received no answer, and on February 28, 1911, he wrote another letter, mailed it, properly stamped and addressed, exactly as the former one; that he received through the United States mail the following reply thereto:

"Law Department,
The Western Union Telegraph Company,
195 Broadway.

George H. Fearons,
General Attorney.

New York, March 7, 1911.

Messrs. I. W. Mayfield & Son, Attorneys,
Lebanon, Mo.

Dear Sirs:

Your letter of the 28th ult., addressed to Mr. Robert C. Clowry, former president of this company, with reference to alleged negligence in the delivery of a message sent by Jessie Covell from Webb City, Mo.,

Digitized by Google

to W. C. Simpson, Stoutland, Mo., has been forwarded to me.

I am advised by Mr. B. Brooks, general manager, that he has no record of your previous letter of January 9th with reference to this matter, and we are, therefore unable to pass upon the question of the company's liability for your client's demand. I am to-day, however, referring the claim to our local superintendent for investigation, with instructions to have the service on the message in question looked into carefully, and a full report furnished at the earliest possible moment. As soon as I hear from him I shall take pleasure in writing you further with regard to the company's liability, if any, in the premises.

Yours very truly,
GEO. H. FEARON,
General Attorney."

It appears that the blank on which plaintiff wrote her message, and also the one on which it was delivered, stated that Mr. R. C. Clowry was president and general manager of appellant, but defendant offered testimony tending to prove that Mr. Clowry resigned both positions on the 23rd day of November, 1910.

We have no hesitancy in saying that under the circumstances if the plaintiff's letter of January 7, 1911, was delivered to Mr. Clowry, or at the office of the general manager of defendant company at New York, sufficient notice was given. The blank used in sending and delivering the message named Mr. Clowry as president and general manager, and according to plaintiff's testimony, the general agent of defendant at Lebanon informed her attorney that he was the proper person to write to in such cases. Under such circumstances, plaintiff was authorized to deal with Mr. Clowry regarding this stipulation in the absence of information on her part that he was no longer an

Digitized by Google

officer of the company. [Manhattan Life Ins. Co. v. Fields, 26 S. W. 280.]

In the case just cited, a policy holder had been paying his premiums at a bank in Texas, and without notice to him the company revoked the bank's agency, but the assured, without notice, tendered his premium at the bank, and in a short time died. Suit was instituted on the policy and the defense was a failure to comply with the terms of the policy regarding the payment of a premium within a specified time. The court held that the assured, in the absence of information to the contrary, had the right to deal with the bank as the agent of the insurance company.

It is true the plaintiff did not show the authority of the agent at Lebanon to make statements binding on the company, and even though it be admitted that his declaration was mere hearsay, it was admitted without objection, and therefore, its weight was for the jury. [Wilkinson v. Telegraph Co., 163 Mo. App. 73, decided by this court April 1, 1912; Metz v. Railroad, 129 N. W. 994; Hoover v. Empire Coal Co., 149 Ill. App. 258; Lindquist v. Dickson, 107 N. W. 958, 6 L. R. A. (N. S.) 729.]

The letter was addressed, R. C. Clowry, General Manager of the Western Union Telegraph Company, New York, and it is the appellant's contention that the address was insufficient, because it did not give the street or number where it was to be delivered.

The fact that a letter was mailed duly addressed and stamped, is evidence that it was received by the addressee. [McFarland v. Accident Assn., 124 Mo. 204, 27 S. W. 436.] The appellant admits this to be the general rule, but claims that where the addressee is in a large city his local address must be given. In 16 Cyc. 1067, it is said: "Receipt of a letter by the person for whom it was intended cannot be presumed unless it is proved that the latter was properly addressed to him, by directing it to the city or town

Digitized by Google

where he resides with the street and number if it is a city of considerable size." In support of the text the author cites Fleming & Co. v. Evans, 61 Pac. 503, and Manhattan Life Ins. Co. v. Fields, supra.

In Manhattan Life Ins. Co. v. Fields, the letter was addressed to Henry Fields, San Antonio, Texas, and no street or number given, and the court held the address was insufficient, and on account thereof there was no presumption that the letter was received by the addressee. In discussing the case, however, the court remarked that the letter was not sent in care of any well-known bank, but simply to Mr. Fields, thereby intimating that if the letter had been sent in care of some well-known institution the address might have been sufficient.

In Fleming & Co. v. Evans, the letter was addressed to a business firm at Chicago, Illinois, and the court held that the address was insufficient. In passing on the case the court said that in a large city like Chicago there might be many persons and firms of the same name, and therefore, there was no presumption that the latter was not received by one of the firms for whom it was not intended.

The appellant has cited us to the rules of the postal department. These rules were not offered in evidence, but the same have been examined, and they recognize the distinction and provide for the delivery of letters where they are sent in care of some well-known business concern, even though the street or number is not given.

Suppose the letter in controversy had been directed to Bank of Commerce, or Mississippi Valley Trust Company, St. Louis, Mo., would the presumption be that it was not delivered because the street number was not given? The courts will take notice of the fact that in all probability the Western Union Telegraph Company has more offices than any other business concern in this country. Its lines enter into almost

Digitized by Google

every town and city, and undoubtedly its general office receives hundreds of letters and other communications daily, and therefore, the government employees distributing and delivering the mail are thoroughly acquainted with the location of its office, and the failure to designate the street or number, would in no wise prevent a prompt delivery of letters directed to the president and general manager of the company.

It stands admitted that the second letter, mailed too late to be received within the sixty day period, but directed exactly as the first one, was promptly delivered, and this gives support to the inference that the first one was also promptly delivered. It is true in the letter from the legal department, it is stated that the general manager reported no record of the receipt of the previous letter. But this was not sufficient to overcome the presumption of delivery. In 16 Cyc. 1071, it is said: "Testimony of the addressee that the letter was not received should be received with caution—with the greatest amount of caution —where non-receipt, if proved, would relieve him of burden; and his failure to recollect whether the letter was received or not, or his impression that it was not received, or the fact that the latter was not on file in his office, is usually deemed insufficient to overcome the presumption of receipt."

The appellant offered no testimony tending to prove that the letter was not delivered. The only testimony on the point is contained in the letter from appellant's attorney, in which he states that the general manager has informed him that he has no record of the previous letter. This suit was instituted on the twelfth day of May, 1911, and was not tried until the twelfth day of August, and defendant must have known that the burden of showing that it had received no notice was upon it, and while it offered testimony in its defense, it made no effort to show that the letter was not delivered.

Digitized by Google

The appellant requested the court to declare that the law required the written notice to be actually served on the defendant, its agents or employees. The court did so declare, but added if the blanks furnished plaintiff upon which to write the telegram, and also the one on which it was delivered, gave the name of Mr. Clowry as president of defendant company, then plaintiff was warranted in giving the notice to him, and if the notice was enclosed in an envelope, properly stamped and addressed to Robert Clowry, at the proper address, and mailed, the presumption is that he received it.

The declaration, as requested, was misleading, as the law does not require the notice to be actually served, but a receipt of it through the mail has always been held sufficient. The modification declaring that plaintiff had a right to deal with Mr. Clowry, as the president of the company was proper under the circumstances of the case. The defendant having furnished the plaintiff a blank by which notice was given that Mr. Clowry was its president, it should not be permitted to deny that he was such official, to the injury of plaintiff, who dealt with him relying on the correctness of the statement to that effect on the blank. And neither was it necessary, under such circumstances, for plaintiff to plead estoppel. [Powell v. Tinsley, 137 Mo. App. 551, 119 S. W. 47; Long v. Lackawanna Coal & Iron Co., 233 Mo. 713, 136 S. W. 673.]

Appellant's last assignment of error is that the court should not have admitted in evidence the letter of January 7th, because no proper foundation was laid for its admission. We suppose appellant means by this that the copy was not the best evidence, and no request had been made for the original. When the letter was offered, certain objections were made, but the one now made was not included. In this connection it may also be said that the objection made in this court that the local address of the company's of-

Digitized by Google

fice was not on the envelope, was not made when the letter was offered.

Our conclusion is that the judgment of the trial court should be affirmed, and it is so ordered. All concur.

---

## JOSEPH SCHNEIDER, Respondent, v. CHARLES T. JOHNSON, Appellant.

**Springfield Court of Appeals, May 6, 1912. Motion for Rehearing Denied June 3, 1912.**

1. **CORPORATIONS: Unpaid Stock Subscriptions: Stockholder's Liability to Creditor: Pleading: Sufficiency of Petition.** In an action against a stockholder by a creditor of a corporation to recover from the stockholder his unpaid subscription to the capital stock to satisfy certain debts owed by the corporation to the plaintiff, the various counts in the petition are examined and *held* sufficient to state a cause of action after verdict.

2. **PRACTICE: Pleading: Sufficiency of Petition: Objection to Evidence.** While the defendant had the right to object to the introduction of testimony on the ground that the petition does not state facts sufficient to constitute a cause of action this practice is one which is to be discouraged and if the petition is sufficient to sustain a judgment the objection should be overruled.

3. **PLEADING: Sufficiency of Petition: When to Object.** Where a petition is fatally defective the objection thereto may be made for the first time after judgment or even in the appellate court.

4. **CORPORATIONS: Unpaid Stock Subscription: Stockholder's Liability to Creditor: Judgment Creditor.** In an action by a creditor of a corporation against a stockholder to satisfy the debts owed by the corporation from the amount due the corporation by the stockholder for unpaid stock subscription, it is not necessary that the creditor should be a judgment creditor of the corporation.

5. **PLEADING: Exhibits.** Exhibits are not a part of the petition and cannot be considered in passing on the sufficiency of the petition.

Digitized by Google

6. **CORPORATION DISSOLUTION: Unpaid Stock Subscription: Stockholder's Liability to Creditor.** A creditor of an insolvent corporation, seeking to satisfy his claims out of an amount due from a stockholder on unpaid subscription to stock, does not have to wait until the corporation's charter has expired or until the corporation has been judicially dissolved, but as to him the corporation will be deemed dissolved when it has ceased to be a going concern and has disposed of its tangible assets and there is no probability of it again carrying on the business for which it was organized.

7. **———: ———: ———: ———: Pleading: Harmless Error.** In an action by a creditor of a corporation against a stockholder to satisfy the corporate debts out of the amount due from the stockholder on account of unpaid subscription to corporate stock, the petition did not allege in definite and certain terms that the appellant was a stockholder at the time of the dissolution, but contained the allegation that the defendant was a stockholder and asked judgment against him on the ground that he was a former stockholder. The trial court's attention was not called to the indefiniteness of this allegation. *Held*, that the defect did not justify reversing the judgment.

8. **APPEAL AND ERROR: Objection to Evidence.** Where the introduction of testimony is objected to on certain grounds, additional objections will not be considered when made for the first time in the appellate court.

9. **ACTIONS ON ACCOUNT: Failure to File Account: Introducing Evidence: Failure to Object.** While section 1832, Revised Statutes 1909, provides that if the items of an account be not set forth in or attached to the petition plaintiff shall be precluded from giving evidence thereof; yet unless the defendant objects to the introduction of testimony or asks to have the account filed, he waives his right to afterwards complain.

10. **CORPORATIONS: Unpaid Stock Subscription: Sufficiency of Evidence.** In an action against a stockholder by a creditor of a corporation to recover and have applied on his debts the amount due the stockholder for unpaid subscription to the capital stock of the corporation, the evidence is examined and *held* sufficient to show that the defendant was indebted to the corporation for unpaid subscription to stock held by him.

11. **JUDGMENT: Sale Under Execution: Judgment Not Satisfied: Corporations.** Where the plaintiff obtained a judgment against a corporation and caused an execution to be levied on its property and at the sale thereunder bid a sum sufficient to pay his judgment and costs, but the property at the time of the sale was covered by a mortgage owned by a stockholder, who at the time was indebted to the corporation for unpaid sub-

Digitized by Google

scription to stock and who subsequently took the property under the mortgage, and plaintiff realized nothing on his judgment, *held*, in an action by plaintiff against the stockholder to recover the amount of the indebtedness evidenced by the judgment, that the sale under the execution did not satisfy the judgment against the corporation.

Appeal from Jasper Circuit Court.—*Hon. Joseph D. Perkins,* Judge.

AFFIRMED.

*McIndoe & Thurman* for appellant.

(1) All of the counts fail to state a cause of action upon an account of an indebtedness. This question was raised by timely objections to the introduction of evidence and also on motion in arrest of judgment. Such objection under section 1804, Revised Statutes 1909, is never waived. Paddock v. Soure, 102 Mo. 226; Hobber v. Coburn, 193 Mo. 547; Hubbert v. Slavens, 218 Mo. 598; Slavens v. Transit Co., 102 Mo. App. 644; Jackson v. Mfg. Co., 106 Mo. App. 441; Ball v. Neosho, 109 Mo. 683. (2) Section 3006, when it refers to the dissolution of a corporation refers to the statutory dissolution and provides for an action against a stockholder at the time of such dissolution. As long as a corporation has officers and directors within the period of its charter, it is not dissolved, even though insolvent; nor will a failure to elect directors or officers or to do business bring about such dissolution. Youree v. Ins. Co., 180 Mo. 165; Bank v. Roubidoux, 57 Mo. 451; Hotel Co. v. Sauer, 65 Mo. 279; Richards v. Mfg. Co., 221 Mo. 149; Bank v. Rockefeller, 195 Mo. 42; Kayser v. Freeman, 16 Mo. 88; Hayner v. Motor Co., 135 S. W. (Mo. App.) 1060; Banking Co. v. Daymon, 195 Mo. 266; McKee v. Rudd, 222 Mo. 344; Bank v. Allen, 195 Mo. 262. (3) The court erred in refusing to strike out the testimony of these witnesses, because the accounts were not filed



Digitized by Google

and the defendant was not bound by such testimony. R. S. 1909, sec. 1832. (4) There is not a particle of testimony in the record to show the value of the leases. The proper rule is stated in Van Cleave v. Berkeley, 143 Mo. 136. There is no evidence whatever and the court did not take the value into consideration and the judgment of the court was based upon the wrong theory. R. S. 1909, sec. 2981.

*Merritt & Spiva* for respondent.

(1) It is not necessary to allege that a judgment had been taken against the corporation. Section 3006, Revised Statutes 1909, does not require judgment to be first taken against a corporation, but provides that if "any company formed under this chapter dissolve leaving debts unpaid, suits may be brought against any person or persons who were stockholders, etc." (2) Appellant in his brief asserts that the dissolution referred to in section 3006 means a statutory dissolution, but the courts in construing this statute disagree with appellant and hold that the dissolution of a corporation will be presumed in favor of creditors when it is shown that it has practically surrendered its corporate rights, has ceased to do business and has transferred all its assets. Bank v. Gallaher, 43 Mo. App. 483; Bank v. Bank, 107 Mo. 133; Bank v. Kellogg, 52 Mo. 583; Moore v. Whitcomb, 48 Mo. 543; State ex rel. v. Societe, 9 Mo. App. 114; Elliott v. Sullivan, 156 Mo. App. 509.

GRAY, J.—In 1909 The Wautauga Mining Company and The Red Fox Mining Company were organized under the laws of this state relating to business corporations. The Wautauga Company had a capital stock of $80,000, divided into 800 shares, and the Red Fox $50,000, divided into 500 shares. The articles of association of each company recited that the stock

Digitized by Google

was paid in full. The appellant subscribed for one share of the Wautauga stock, and paid for same. He subscribed for 200 shares of the Red Fox stock, and paid thereon $3000. Both companies maintained offices in Joplin, and engaged in mining in Jasper county, but proved to be financial failures, and ceased to transact business about a year before this suit was commenced. Their properties were covered by mortgages, and according to the testimony, they had no intention to, and were absolutely unable, to resume business.

The Wautauga Company at the time it ceased business, owed debts to numerous creditors of whom it had purchased supplies and machinery to enable it to carry on its mining operations, and this plaintiff was one of such creditors, and the accounts of fifteen other creditors were assigned to him for collection, and this suit was instituted on these accounts and against the defendant for his unpaid subscription to the capital stock.

The Red Fox Company at the time it ceased to do business, was indebted to the plaintiff for machinery and supplies furnished, and was also indebted to eleven other creditors, who assigned their accounts to plaintiff, and a suit was instituted by plaintiff against the appellant on all of said demands, and seeking to recover on the theory that appellant had not paid for his stock and was indebted to the company therefor at the time it ceased to do business, and at the time the suit was instituted. The two suits were consolidated by agreement, and tried as one, and the plaintiff recovered a judgment on each count of the two petitions, and defendant appealed to this court.

It is claimed the petition fails to state a cause of action. As each count is practically the same, it will only be necessary to consider one.

The second count charges: "That the Wautauga Mining Company was a corporation doing busi-

Digitized by Google

ness in Joplin, Missouri, in 1909, but on or about the first day of March, 1910, said corporation was dissolved by abandonment of its business and property, all its property being consumed by liens and mortgages, and it has now no assets or property, and the said corporation left among other debts unpaid an indebtedness due to the Home Powder Company, a corporation, in the sum of twenty-seven dollars for powder and blasting material, and the same remains due and unpaid. The said Home Powder Company has this day assigned its said account to this plaintiff for the purpose of collection, and the same is herewith filed marked 'Exhibit B.' Plaintiff states that the defendant was the owner and holder of the stock of the said Wautauga Mining Company, of the par value of $11,100 and took said stock knowing the same had not been paid up, and there is now due and unpaid on the said stock so held by the defendant the sum of $6,500. Wherefore, plaintiff sues the said defendant as a former stockholder in said Wautauga Mining Company for the sum of twenty-seven dollars and for costs of suit."

The counts in the Red Fox transaction were practically the same, except they alleged that the appellant was one of the original subscribers to the capital stock of the company, and had not paid therefor. No demurrer was filed to the petition and appellant answered, and not until trial was commenced, and then only by oral objection to the introduction of testimony, was any complaint leveled against the petition.

While the defendant has the right to object to the introduction of testimony on the ground that the petition does not state facts sufficient to constitute a cause of action, this practice is one which is to be discouraged, and if the petition is sufficient to sustain a judgment, the objection should be overruled. [Mfg. Co. v. Montgomery, 144 Mo. App. 494, 129 S. W. 460;

Digitized by Google

Johnson & Co. v. Ice & Refrigerating Co., 143 Mo. App. 441, 127 S. W. 692.] Of course if the petition is fatally defective, then the objection may be made for the first time after judgment, or even in the appellate court. [Simpson v. Witte Iron Works Co., 144 S. W. 895.]

It is first claimed that the petitions are fatally defective because they do not allege that any judgment had been rendered against the corporation. It is not necessary that the creditor should be a judgment creditor. [State Savings Assn. v. Kellogg, 63 Mo. 540; Bittner v. Lee, 25 Mo. App. 559.]

The next objection is that the accounts sued on were not filed. Exhibits are not a part of the petition, and cannot be considered in passing on the sufficiency of the petition. [Paper Co. v. Publishing Co., 156 Mo. App. 187, 136 S. W. 736; Merrill v. Central Trust Co., 46 Mo. App. 237; Lime & Cement Co. v. Wind, 86 Mo. App. 163.]

The petitions are further objected to on the ground that they do not show that the corporations were dissolved in the manner provided by section 3006, Revised Statutes 1909. Under the settled law of this state, the creditor of an insolvent corporation does not have to wait until the corporation's charter has expired, or until the corporation has been judicially dissolved, but as to him the corporation will be deemed dissolved when it has ceased to be a going concern, and has disposed of its tangible assets and there is no probability of its again attempting to carry on the business for which it was organized. [Farmers Bank v. Gallagher, 43 Mo. App. 483; Bank v. Kellogg, 52 Mo. 583; Moore v. Whitcomb, 48 Mo. 543; Elliott v. Sullivan, 156 Mo. App. 496, 137 S. W. 287; Brookline Canning & Packing Co. v. Evans, 163 Mo. App. 564, decided by this court April 1, 1912.]

The last objection to the petitions is that that it is not alleged that defendant was a stockholder at the

Digitized by Google

time of such dissolution. It is true the petitions do not allege that the appellant was a stockholder at the time of the dissolution, but it is alleged that he was a stockholder and then asked judgment against him on the ground that he was a former stockholder.

It seems to us that in as much as no demurrer was filed to the petitions, or no motion to make them more definite and certain, and that in the objection to the introduction of testimony the trial court's attention was not called to the indefiniteness of this allegation, we would not be justified in reversing the judgment on account of this defect.

The correctness of the accounts and the assignments thereof were testified to by the former secretary of the corporation, and also by an attorney who had them for collection. Appellant claims the court erred in admitting the testimony, because the accounts were not on file. While appellant's counsel objected to the testimony of the witnesses on certain specific grounds, the one now urged was not included. The petitions allege that the accounts were filed and marked as exhibits in the case, but whether they were or not, the record does not disclose. While our statute provides (Sec. 1832) if the items of an account be not set forth in, or attached to the petition, plaintiff shall be precluded from giving evidence thereof, yet unless the defendant objects to the introduction of testimony, or asks to have the account filed, he waives his right to afterward complain. [Mayer v. McCabe, 73 Mo. 236.]

In behalf of the plaintiff, the court instructed that a dissolution of a corporation will be presumed in favor of its creditors when it has shown that it has practically surrendered its corporate rights, has ceased to do business, and has transferred all its assets, and if the court sitting as a jury, found from the evidence that the corporation had, before the commencement of the suit, ceased to do business, and all

Digitized by Google

its assets had passed out of its hands, and that the defendant was the owner of stock in the corporation, and the stock was not paid up, and that the corporation owed the debts sued for, and that they had been assigned to plaintiff for collection, the judgment should be for the plaintiff in such sum as from the evidence the court should find to be due from the defendant on his stock, now exceeding the sum sued for and the costs of suit.

The action of the court in giving such instruction is assigned as error, and the first objection is that the dissolution that authorizes a suit by the creditor is one contemplated by the statute. This point, we have already passed on, and adversely to the appellant's contention.

It is said the instruction is erroneous because it takes no account of the difference between the value of the property put into the corporation, and the stock subscribed. In Van Cleve v. Berkey, 143 Mo. l. c. 136, 44 S. W. 743, it is declared that where property was taken in payment of the capital stock of a corporation, and it is shown that it was of less value than the par value of the stock, the subscriber is chargeable only for the difference. Under the evidence, however, this question is not material in this case. It stands admitted that in the Red Fox transaction, the appellant subscribed for $20,000 par value, and only paid $3000. By his own testimony he was indebted to the corporation, from the time it was organized until this suit was tried, in a sum largely in excess of the amount sued for in this case.

When the Wautauga Company was organized, one L. M. Gardner subscribed for 794 shares of the par value of $79,400. At the same time the appellant and others entered into a contract with Gardner, in which the value of a certain mining lease held by Gardner was fixed at $15,000, and it was to be turned into the corporation at that price, and was all that was paid

Digitized by Google

in on the 794 shares subscribed for by Gardner. This contract provided for a transfer and sale of all Gardner's stock to the appellant and others on this basis, and fully established the fact that the appellant and his associates contracted for the Gardner stock, knowing that the same had not been paid for. And at the trial the deposition of the appellant was read, in which he stated that he acquired seventy-five or eighty shares of the stock, and had the same in his safe at the time his deposition was taken. Appellant offered the stock book of the corporation showing that there were issued to appellant eighty-one shares of the stock. In the case of this plaintiff against the appellant, reported in 161 Mo. App. 375, 143 S. W. 78, we discussed this whole transaction, and there held that the appellant was indebted to the corporation for stock in a sum in excess of the amount sued for by plaintiff in this action, and therefore, we will not again go into the details but reaffirm the conclusions in that case.

The appellant's instructions were demurrers to the evidence and from what we have said, were properly refused.

The plaintiff obtained a judgment on his account against the Wautauga Company, and caused an execution to be levied on its property, and at the sale thereunder bid a sum sufficient to pay his judgment and costs, and, it is claimed, that on account thereof, he is not entitled to a judgment against the appellant. The evidence discloses that at the time of the sale, the property was covered by a mortgage owned by the appellant, and was subsequently taken thereunder so that plaintiff realized nothing on his judgment. Under the authority of Young v. Schofield, 132 Mo. 650, 34 S. W. 497, the appellant's judgment was not paid.

The plaintiff's case is a meritorious one. He and his assignors sold and delivered goods and supplies to the corporations, and the appellant was indebted

Digitized by Google

to the corporations in a sum largely in excess of the amount of the claims represented in this action, and there is no valid reason why he should not pay to their creditors the amount he owes on his stock subscriptions, and an examination of the record convinces us that no prejudicial error was committed against him, and therefore, the judgment will be affirmed. All concur.

---

## STATE ex rel. L. S. WEAST, Relator, v. JOHN T. MOORE, Respondent.

**Springfield Court of Appeals, May 6, 1912. Motion for Rehearing Denied June 3, 1912.**

1. **PROCESS: Non-Resident Defendant: Served While Attending Court in Another Action.** A non-resident of the state of Missouri, when attending court as a defendant and witness in a cause in obedience to a summons and for the sole purpose of protecting his interest therein and of testifying in his behalf at the trial thereof in an action brought against him by a resident of the state and county wherein the action is pending, can be served with process and compelled to appear and defend in another action by the same party.

2. **APPEAL AND ERROR: Supreme Court Decision.** The Courts of Appeal are bound by the decisions of the Supreme Court.

3. **———: ———: Obiter Dictum.** Where a record properly presents a question, a decision thereon is not *obiter dictum*, though perhaps the decision of some other point determines the affirmation or reversal of the judgment in that case.

4. **PROCESS: Non-Resident Defendants: Served While Attending Court in Another Action.** Section 1751, Revised Statutes 1909, governing the service of process on non-residents, makes no exceptions as to a non-resident who is served with process while attending court as a witness or party in another cause, and the courts are not authorized to make any exception. Following opinion of the Supreme Court in Baisley v. Baisley, 113 Mo. 544.

Digitized by Google

Original Proceeding by Writ of Prohibition.

WRIT DENIED.

*Hamlin & Seawell* for relator.

(1) The only Missouri cases upon this subject that we have been able to find are as follows: Christian v. Williams, 111 Mo. 429; Baisley v. Baisley, 113 Mo. 544. (2) In Wilson Machine Co. v. Wilson, 22 Fed. (Conn.) 803, this question is squarely presented and the court at page 804 calls attention to the case of Bishop v. Vose, 27 Conn. 1, cited in 113 Mo. 540, and drew a distinction between a non-resident plaintiff attending court and a non-resident defendant, holding that the latter was privileged. In Wilson v. Donaldson, 20 N. E. 250, 117 Ind. 356, 10 Am. St. Rep. 48, the Supreme Court of Indiana construes a statute similar to ours and upon similar facts, holding that the statute and the word "found" is considered in connection with the policy of the law which exempts a non-resident defendant from process while attending court. This is a strong decision and we call especial attention of the court to it. In 32 Cyc. 492 the doctrine of privilege is declared and cases of different states cited.

*Moore & Thornbury* for respondent.

GRAY, J.—This is an original proceeding in this court to obtain a writ of prohibition, prohibiting the Honorable John T. Moore as judge of the thirty-first judicial district of this state from entertaining further jurisdiction in a certain case in Stone county, wherein Nellie Wickersham is plaintiff, and the relator is the defendant.

The question to be determined is presented in the following agreed statement of facts: "It is agreed that the sole and only question to be decided is whether

Digitized by Google

a non-resident of the state of Missouri when attending court, as a defendant, and witness, in said cause in obedience to a summons for the sole purpose of protecting his interests therein and of testifying in his behalf at the trial thereof, in an action brought against him by a resident of the state and county wherein said action is pending, can be served with process and compelled to appear and defend an action by the same party, after said former action is voluntarily dismissed by said resident plaintiff and the same petition immediately re-filed in said court and summons issued and served upon said non-resident defendant while attending said court as a party defendant and witness in his own behalf in the former action and before he has a reasonable time to return to his home or leave said county after his attendance upon the court for the purposes aforesaid."

If we determine the question by the weight of authority, it must be answered in the affirmative. In Mullen v. Sanborn, 25 L. R. A. 721, the authorities are collected in a note consisting of eighteen pages, and an examination thereof will disclose that the authorities are practically unanimous and hold that a non-resident party to a suit cannot be served with process while temporarily within the state for the purpose of attending as a party and a witness. The rule is well stated in Cooper v. Wyman, 29 S. E. 947, 65 Am. St. Rep. 731, wherein the court said: "As stated in many of the cases, this settled rule is based upon high considerations of public policy, not upon statutory law, since it is the public interest that suitors and witnesses from other states, who cannot be compelled to attend our courts, may not be deterred from voluntarily appearing by fear of being served with process in other actions; their presence, if obtainable, being calculated to enable the courts to more thoroughly educe the truth of the matters in litigation. In some few of the earlier cases it was questioned whether the

Digitized by Google

privilege was not restricted to witnesses; but all the later and better considered cases embrace parties as well as witnesses, more especially since the change, which enables parties to be examined as witnesses."

The late cases are collected in Breon v. Lumber Co., 65 S. E. 214, 24 L. R. A. (N. S.) 276; Barber v. Knowles, 82 N. E. 1065, 14 L. R. A. (N. S.) 663; United States v. Zavelo, 177 Fed. 536; Chittenden v. Carter, 74 Atl. 884; Brook v. State ex rel., 79 Atl. 790; Long v. Hawken, 79 Atl. 190, and they fully sustain the proposition that the litigant is privileged while so attending as a party and a witness in a foreign state.

If we are not bound by controlling decisions of our own court, we would be inclined to adopt the rule supported by this great weight of authority, but the respondent claims our Supreme Court in Christian v. Williams, 111 Mo. 429, 20 S. E. 96, and Baisley v. Baisley, 113 Mo. 544, 21 S. W. 29, declared otherwise. If this contention is true, then it must control our action. In the first case the defendants were residents of Randolph county, this state, and the plaintiff, of the city of St. Louis. One of the defendants had been served with process in the city of St. Louis, and while in attendance on the trial in that case, was served with a summons in another action, and he invoked the rule of privilege in his behalf. The court held against him, and said: "Witnesses as well as parties are protected from arrest while going to the place of trial, while attending there for the purpose of testifying in the cause, and while returning home. But this privilege at common law extended only so far as to discharge from arrest, when arrested on civil process, and did not abate the suit; that still went on, and the party arrested was held upon common bail, that is, he entered his appearance in the action. . . .

Digitized by Google

"Of course these remarks do not apply to a case where a party is induced by fraud or compelled by criminal process to enter within the boundaries of a county other than that of his residence.

"It is said that public policy demands that suitors, witnesses, etc., should be privileged from the service of civil process while attending court, lest they be deterrred from attending, and thus the administration of justice be obstructed. However this might be as to non-resident witnesses as to whom no process could issue, or as to non-resident suitors, as to whom it would be improper now to speak, it is sufficient to say that as to witnesses resident in this state we have process by which their attendance can be compelled from any part of this state. . . Moreover, it could hardly be deemed the public policy of this state to deny the service of civil process on a party attending court, when we have a statute whereby a plaintiff may have a summons directed to 'any sheriff in the state of Missouri,' with a possibility of bringing parties and suitors hundreds of miles to attend a common forum, remote from their homes and remote from their witnesses."

It may well be doubted whether this case, when considered alone, really announces a doctrine contrary to the weight of authority. But in Baisley v. Baisley, the process was served on a non-resident of this state while attending court herein, and considering his claim of privilege, our court said: "The fourth clause of section 2009, Revised Statutes 1889, provides that: 'When all the defendants are non-residents of the state, suit may be brought in any county in this state.' It will be observed that this clause is without limitation or restriction. . . .

"In the recent case of Christian v. Williams, 111 Mo. 429, we held that where a person was attending court in this state in the capacity of party in a county other than that of his residence, that he might be sued

Digitized by Google

in the county of the forum of his attendance, and that under the first clause of said section 2009, he was 'found' within the meaning of that clause, and that in such circumstances he could not successfully plead to the jurisdiction of the court where he was thus served. In thus construing that clause of the section, we gave the word 'found' its ordinary meaning, and we do not see why we should not do the like in construing the fifth clause of same section, and accord to its words their usual import and customary meaning. The defendant is a non-resident; being such, he may be sued in any county in the state; for so the statute provides, and it must control. The statute makes no exceptions, and we are not authorized to make any."

It is true in the Baisley case the court, after holding as above set forth, gave the additional reason that the plaintiff had voluntarily come into Missouri and instituted a suit against a resident of this state, and therefore, had waived his right to stand on his question of privilege. In so holding, the court was in line with the weight of authority, and it was not absolutely necessary for the court to have put its decision on the broad ground that no non-resident suitor is exempt in this state, and for this reason the relator claims that so much of the decision as we have copied into this opinion, is mere dictum and not controlling.

In Kane v. McCown, 55 Mo. 181, it is held that where the record properly presents a question, a decision thereon is not *obiter dictum,* though perhaps the decision of some other point determines the affirmation or reversal of the judgment in that case. And this is the general rule. [Gibson v. Chouteau, 7 Mo. App. 1; Union P. R. Co. v. Ry. Co., 199 U. S. 160, 26 Sup. Ct. Rep. 19; also same case in 128 Fed. 230; King v. Pauly, 115 Pac. 210; Chicago, B. & Q. R. Co. v. Board of Supervisors, 182 Fed. 291; Kierman v. City of Portland, 112 Pac. 402; Spratt v. Power Transmis-

Digitized by Google

sion Co., 94 Pac. 631; People v. Reed, 84 N. E. 214; State v. Brookhart, 113 Iowa 250, 84 N. W. 1064; Michael v. Mowry, 26 Md. 230, 90 Am. Dec. 106.]

In the Baisley case the Supreme Court plainly held that the statute governing the service of process on non-residents makes no exceptions, and that the courts are not authorized to make any, and from a reading of that case it will appear that the finding of the court would have been based on that ground alone, if no others had been presented; and this being true, the decision is binding on this court, and therefore, the permanent writ is denied.

All concur.

---

## WILLIAM F. CARROLL, Appellant, v. THOMAS J. LEMMONS, Respondent.

**Springfield Court of Appeals, June 3, 1912.**

1. **PRINCIPAL AND AGENT: Loan Agent: Incurring Expenses.** In an action by a loan agent to recover a commission and the cost of the abstract and the expenses incurred in perfecting defendant's title to the real estate, which was to secure the loan; the making of the application for the loan by the defendant and agreeing therein to pay for the abstract and expenses in perfecting the title were admitted. It was further admitted that the defendant refused after the abstract had been made and the other expenses incurred, to complete the transaction. *Held*, that the verdict of the jury in favor of the defendant was against all the evidence and the instruction of the court so far as the same related to the items for cost of the abstract and the court should have set the same aside.

2. **ACCOUNTS: Assignments: Justice Courts.** Where the plaintiff having authority from the defendant to do so, had ordered an abstract from the abstracter and the latter's account therefor was turned over to the plaintiff and thereafter the plaintiff instituted a suit against the defendant on account of the cost of the abstract, the assignment to the plaintiff of the abstracter's account was *held* legal, although no written assignment thereof was executed until after the case was tried before the justice.

Digitized by Google

Appeal from Texas Circuit Court.—*Hon. L. B. Woodside,* Judge.

REVERSED AND REMANDED.

*William F. Carroll pro se,* appellant.

(1) Where a broker employed to negotiate a loan obtains one ready and willing to make the loan and it turns out that the title to the real estate is imperfect, so that the loan is not made, he is entitled to his commission; also where the borrower changed his mind and refused to accept the loan. Fitch on Real Estate Agency, 113. (2) A new trial should be granted where the verdict is against the weight and the entire current of the testimony or verdict contrary to the law and evidence. Taylor v. Fox, 16 Mo. App. 529; Choquette v. Railroad, 152 Mo. 257. (3) In the absence of fraud, accident or mistake, it is conclusively presumed that the whole engagement and the extent and manner of their understanding was reduced to writing. May v. Ins. Co., 72 Mo. App. 286; Robinson v. Jarvis, 25 Mo. App. 421.

*Lamar, Lamar & Lamar* for respondent.

GRAY, J.—The plaintiff is a loan agent representing Wells & Adams, of Quincy, Ill. On the second day of April, 1910, the defendant made an application in writing to Wells & Adams for a loan of $800 on his real estate. By the terms of the application the defendant agreed to furnish an abstract of title to his property and to pay the expenses incurred in perfecting the title. In the same application the defendant appointed the plaintiff his attorney to procure the loan. After the execution of the application, the plaintiff ordered an abstract at a cost of nine dollars, and secured and paid for some affidavits regarding the title to meet certain requirements of Wells &

Digitized by Google

Adams. The defendant refused to take the loan and plaintiff instituted this suit before a justice of the peace of Texas county, to recover his commission, costs of the abstract, expenses of procuring the affidavits, and a fee of ten dollars for work perfecting the title. The application to Wells & Adams was assigned to the plaintiff. The judgment in the justice court was for the defendant and plaintiff appealed to the circuit court, where the cause was tried before a jury, resulting in another judgment in favor of the defendant, and plaintiff has appealed to this court.

The plaintiff offered no testimony regarding his commission, but the fact that he paid for the affidavits and ordered the abstract, and that the abstract, at the regular fees for same, amounted to nine dollars, was undisputed. The defendant said, at the time the application for the loan was made, it was estimated the abstract would cost about four dollars, but the written application, signed by him, provided that he was to furnish a complete abstract of title. The account for the abstract was assigned in writing to the plaintiff, but this was not done until after the case was tried before the justice. The plaintiff and the abstracter testified, however, that the account was delivered to the plaintiff before the suit was instituted.

The court gave the following instruction: "The jury are instructed that if they believe the defendant authorized the plaintiff to order an abstract of title to his land for the purpose of a loan and plaintiff did so, that the defendant is owing the plaintiff the reasonable value of said abstract and the jury should find for the plaintiff."

The following instruction asked by the plaintiff was refused: "The jury are instructed that it is only necessary for the plaintiff to show he had substantially performed his contract. If the defendant changes his mind and prevents the plaintiff from fully completing



Digitized by Google

the contract, that does not deprive the plaintiff of moneys agreed to be paid by the defendant or expenses incurred by plaintiff for the defendant for abstract of title or notary fees or expenses incurred in attempting to perfect the title to the land offered as security for a loan."

The making of the application for the loan and agreeing therein to pay for the abstract and expenses in perfecting the title was admitted. It was further admitted that the defendant refused, after the abstract had been made and the other expenses incurred, to complete the transaction. The plaintiff had ordered the abstract from the abstractor, and the latter's account therefor was turned over to plaintiff before the suit was instituted before the justice. The assignment was legal. [Johnson Co. v. Bryson, 27 Mo. App. 341; Boyle v. Clark, 63 Mo. App. 473.]

The verdict of the jury was against all the evidence and the instruction of the court so far as the same related to the item for costs of the abstract and the court should have set the same aside.

The judgment will be reversed and the cause remanded. All concur.

---

## STATE OF MISSOURI ex rel. FITCH, Relator, v. EDWIN LONG et al., Respondents.

**Springfield Court of Appeals, June 3, 1912.**

1. **MUNICIPAL CORPORATIONS: Dramshop License: Increasing License.** In a mandamus proceeding against a city of the fourth class to compel the issuance of a dramshop license to the relator, it appeared that the county court had renewed the relator's license for six months, but before the relator presented his application to the board of aldermen for a renewal of his license the board passed an ordinance increasing the dramshop licenses from $500 to $750, for each six

Digitized by Google

months. The relator claims he was entitled to his license upon the payment of $500 and that the ordinance is in conflict with the state law because it requires the payment of a tax in excess of the amount the statute allows the county court to assess for a license. *Held*, that the city has a right to increase the license fee and could require the relator to pay the $750 as provided by the ordinance before issuing him a license.

2. **DRAMSHOP LICENSE: Renewal: Increasing License: County Courts.** Section 7206, Revised Statutes 1909, does not provide that the county court shall issue a dramshop license for the second six months upon the payment of the amount collected for the first six months.

3. **COUNTY COURTS: Dramshop License: May Refuse to Renew.** A county court is not compelled at the expiration of the first six months to renew a dramshop license for another six months, but may refuse to do so for any reason it may have refused to issue it when first applied for.

4. **MUNICIPAL CORPORATIONS: Ordinances: Prescribing Heavier Penalties than State Law.** The mere fact that a municipal ordinance prescribes a heavier penalty than the state law for the same offense does not render the ordinance void as being inconsistent with the general law of the state.

5 **———: County Courts: Dramshop License.** The statute gives the right to the county court to fix the amount of dramshop license for state and county purposes and the board of aldermen of cities of the fourth class is given the right to fix the amount in such city. They are not inconsistent provisions, although the amount the county court may assess is limited by the statute and the board of aldermen is not controlled by the limit placed upon the county court.

6. **———: Dramshop License: Amount Must Be Reasonable.** Although the board of aldermen of a city of the fourth class in fixing the amount to be paid for dramshop licenses is not limited to the amount the county court may charge for such license, yet if the board of aldermen were to assess an exorbitant sum the ordinance would be unreasonable and therefore void.

7. **———: ———.** The Legislature did not intend that section 7225, Revised Statutes 1909, should in any manner regulate the granting of dramshop licenses by municipalities, as their right and power already existed under their charters.

## Original Proceeding in Mandamus.

WRIT DENIED.

Digitized by Google

*Bland, Crites & Murphy* for relator.

*John O. Holmes* for respondent.

GRAY, J.—The relator is an applicant for license to keep a dramshop in the city of Rolla, a city of the fourth class. The respondents are the mayor and board of aldermen of that city. An alternative writ was issued by the clerk of this court, and respondents have made their return thereto. The facts are conceded, and there is but one point for decision.

At the November term of the county court of Phelps county, the relator presented his application and petition for a license to keep a dramshop at his place in the city of Rolla. The county court found that he was entitled to a license, and a six months' license was issued to him, expiring on the 20th day of May of this year. On the 19th day of November, 1911, the city of Rolla caused to be issued to relator a dramshop license under the ordinances of said city, and expiring on the same day his county license expired. On the 6th day of May of this year, the relator presented his application for a renewal of his license to the county court of Phelps county, and otherwise complied with the law regarding renewal of licenses, and the court granted a license for six months from the 20th day of May. On the 6th day of May, the relator presented his application for a renewal of his license to the city authorities.

When the license was originally granted, and at the time the county court renewed the same on May 6th, there was an ordinance in force in the city of Rolla, fixing the dramshop license fee at the sum of $500 for each six months. It further appears that on the 6th day of May, and before the relator presented his application to the board for a renewal of his license, the board passed an ordinance increasing the dramshop license fee to $750 for each six months. The

Digitized by Google

relator claims he is entitled to his license upon the payment of $500, and the respondents claim they have the right to collect $750 therefor, and this is the only point in the case.

In determining the legal question presented, it is proper to begin with the proposition that the county court of Phelps county and the board of aldermen of Rolla, are independent bodies not governed altogether by the same law, and that the powers of both are limited and prescribed by law. Under the statute, the county court is not authorized to grant a dramshop license until the person applying therefor has filed a petition in conformity to the statute and an application in which it is stated that the applicant is a law-abiding, assessed, taxpaying citizen. The statute provides that when such an application and petition have been filed, the county court may grant a license for the period of six months; that the petition shall be good for the period of twelve months, and at the end of the first six months' period the county clerk may grant a renewal license for an additional six months, upon the payment by the applicant of the same amount that he was required to pay for the first six months.

The municipal ordinance of Rolla, relating to dramshops, does not require the applicant to file any petition, but only an application stating where the dramshop is to be kept, and the full name of the applicant. The ordinance then provides: "If the board of aldermen be of the opinion that the applicant is a person of good moral character and suitable to keep a dramshop, they shall order a license to be issued to said applicant."

The ordinance also differs from the statute in regard to its duration. The statute provides that the license shall be issued for six months while the ordinance provides that it shall be issued for not less than six months.

Digitized by Google

Leaving out of consideration sections 9582 and 7225, Revised Statutes 1909, we would have no hesitancy in saying that the relator is not entitled to the relief prayed for. Section 9582 reads: "Any municipal corporation in this state, whether under general or special charter, and having authority to pass ordinances regulating subjects, matters and things upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall confine and restrict its jurisdiction and the passage of its ordinances to and in conformity with the state law upon the same subject."

In State ex rel. v. McCammon, 111 Mo. App. 626, 86 S. W. 510, the relator, as in this case, applied for a writ of mandamus to compel the board of aldermen of the city of Albany, a city of the fourth class, to grant him a dramshop license. Albany contained more than two thousand inhabitants, and it was admitted that the relator possessed all the qualifications and had complied with the statutes regarding dramshop licenses, and that he was entitled to his license, unless his right was controlled by an ordinance of the city by which applicants for dramshops were required to obtain two-thirds of all the qualified petitioners of the entire city, instead of the block, as required by the state statute. The court granted the writ and said: "We are of the opinion that the charter powers relied upon do not confer authority upon the city to overturn the general law on the subject of dramshops. So therefore when the state law says that a license shall be granted on the petition of two-thirds of the inhabitants of a block, the board of aldermen have not the authority to say that there shall be a petition of two-thirds of the entire city. Though the city is authorized to regulate a dramshop, it cannot regulate it in those particulars which would be inconsistent with the regulations made by the state."

Digitized by Google

In State ex rel. Smith v. Berryman, 142 Mo. App. 373, 127 S. W. 129, the relator applied to this court for a writ of mandamus to compel the mayor and council of the city of Poplar Bluff to grant him a dramshop license. The city had an ordinance which required a majority of all the members elected to the council, to be of the opinion that the applicant was a law-abiding person before granting him a license. It was agreed that the relator was a law-abiding, assessed, taxpaying, male citizen of Butler county, and that his petition presented to the city council contained the names of two-thirds majority of the assessed taxpaying citizens and guardians, as required by the statute. We held that the city did not have the power to prescribe by ordinance, that to entitle a person to a dramshop license, two-thirds majority of all the members of the council elected should first find that he possessed the proper qualifications.

The relator says the statute provides that the amount fixed for the renewal license shall be the same as was collected for the first six months. We do not so construe the statute. Section 7206 does provide that the county clerk in vacation, shall issue the license for the second six months upon the payment of the amount collected for the first. Section 7207 requires the clerk to report to the county court all licenses granted by him in vacation. Section 7199 provides that there shall be collected on each license, a state and county tax of not less than $300 or more than $600—the amount of the tax in every instance to be fixed by the court granting the license.

In State ex rel. v. Higgins, 84 Mo. 531, the court said: "The three sections when read together, show that the grant of a license by the clerk in vacation, is but for the convenience of the dramshop keeper and to prevent him from being forced to close up his place of business, until the next term of the county court, in the event his first license should expire in vaca-

Digitized by Google

tion of the court, and that the license issued by the clerk in vacation, to be good for six months, must be reported to the court, and be by it renewed."

It is further held in the Higgins case, that the office of the petition is simply to confer jurisdiction on the court to issue a license to the applicant, and that it confers such jurisdiction for one year from the date of its filing, but it gives no rights whatever to the applicant for a license, and that at the expiration of six months, the court is not compelled to renew the license, but is at liberty to refuse it for any reason it might have refused it when first applied for.

It is claimed the ordinance is in conflict with the state law, because it requires the payment of a tax in excess of the amount the statute allows the county court to assess for a license.

In St. Louis v. Delassus, 205 Mo. 578, 104 S. W. 12, the city prosecuted the defendant to recover a fine for violating a city ordinance. The state law fixed the penalty for the same act at a fine not exceeding fifty dollars, while the city ordinance fixed the fine at not less than twenty-five dollars, nor more than one hundred dollars. It was claimed that in as much as the Constitution provides that the municipal charter and ordinances must be consistent with and subject to the Constitution and laws of the state, that the ordinance was void, but the court held that "consistent with" did not import exact conformity but meant substantial harmony, and that of necessity, there must be more or less variance between the municipal ordinances and the state law, and that the ordinance was not so inconsistent with the Constitution as to render it void.

In Kansas City v. Hallett, 59 Mo. App. 160, the court held that while the municipal ordinances, to be of any validity, must be consistent with the general statutes of the state, the mere fact that the ordinance prescribes a heavier penalty than the state law for

Digitized by Google

the same offense, does not render the ordinance void as being inconsistent with the general laws of the state.

It seems to us that giving to the county court the right to fix the license for state and county purposes, and the board of aldermen the right to fix the amount in cities of the fourth class for city purposes, are not inconsistent provisions, although the amount the county court may assess is limited by the statute. Of course if the aldermen were to assess an exorbitant sum, the ordinance would be unreasonable, and therefore, void.

The relator further contends that section 7225 of the Revised Statutes 1909, controls the action of the council in this matter. This section is found in the general dramshop act, and provides that that act shall apply to and be in force in every incorporated town and city in the state, any ordinance of such city to the contrary notwithstanding. This section was enacted in 1907, and the reason for which is apparent. Just before the Legislature convened in 1907, the Kansas City Court of Appeals had held in State v. Kessels, 120 Mo. App. 233, 96 S. W. 494, and State v. Binswanger, 122 Mo. App. 78, 98 S. W. 103, that the state law was not in force in the city of St. Joseph, and that that city had the exclusive power to regulate and license dramshops. The Legislature enacted this section in order to annul the effect of those decisions and to put the state law in force in every part of the state. It was not intended that the act should in any manner regulate the granting of licenses by municipalities, as that right and power already existed under their charters, and section 9582 was in full force requiring that all municipal regulations be in conformity to the state law.

We are not dealing with the equities of the case. They were for the board of aldermen to consider at the time the relator applied for his dramshop license,

Digitized by Google

and the record shows that three of the aldermen were in favor of granting the relator his license at the price charged for the first six months. The members of the board who voted to grant the license, were, perhaps, governed by the fact that the applicant had applied to the county court and had paid his money in good faith, relying on the ordinance of the city, and that it was unjust to him to materially increase the license fee at a time when it was too late for him to withdraw his money from the county and state. These matters are not for our consideration, as we must be controlled by the statute and ordinances as we find them. It is our conclusion that the city had the right to increase the license fee, and the sole remedy of the relator was to apply to the courts to have the ordinance declared void if the amount fixed was unreasonable.

We are of the opinion that the relator was not legally entitled to a license without paying the sum provided in the ordinance as amended, and therefore, the peremptory writ will be denied.

*Cox, J.*, concurs; *Nixon, P. J.*, not sitting.

---

## STATE OF MISSOURI, Respondent, v. CLYDE RHEA et al., Appellants.

**Springfield Court of Appeals, June 3, 1912.**

1. **CRIMINAL LAW: Larceny: Killing Turkeys: Malicious Mischief.** Defendants were prosecuted for larceny the information charging that "they unlawfully, willfully and feloniously did take, steal and carry away twenty-five turkeys, etc." The evidence showed that defendants killed several of the turkeys by throwing stones at them and after killing them the turkeys were collected into piles, but were not removed and there was no claim that the defendants made any use of the turkeys. *Held*, that the defendants were not guilty of larceny.

Digitized by Google

2. ———: ———. In order to constitute the crime of larceny it is necessary that the goods be taken with the intent not only to deprive the owner of the use thereof, but to convert them to the use or benefit of the defendant.

3. ———: ———: Killing Animals. The mere unlawful killing of animals is not larceny in this state.

Appeal from the Christian Circuit Court.—*Hon. John T. Moore,* Judge.

REVERSED.

*G. Purd Hays* for appellant.

*Fred W. Barrett* for respondent.

GRAY, J.—July 25, 1911, the prosecuting attorney of Christian county filed an information charging that Clyde Rhea, Phil Ellingsworth and W. Lathrop, at said county, unlawfully, willfully, and feloniously did take, steal and carry away twenty-five turkeys of the value of fifty dollars, the property of Thomas F. Coyne. The cause was dismissed as to the defendant, Lathrop, and the other defendants entered pleas of not guilty, and were tried before a jury and convicted of petit larceny, and they appealed to this court.

No briefs have been filed, but we assume from the appellant's motion for new trial they complain of the action of the court in submitting the case to the jury, and in giving certain instructions. The testimony on the part of the state tended to prove that appellants and Lathrop, while walking through a field belonging to one of Coyne's neighbors, saw some old turkeys with their broods of young. The boys killed several of the turkeys by throwing stones at them, and after killing them, they were collected into piles, but were not removed therefrom, and there was no claim that the boys made any use of the birds, but all the testimony tended to show that the boys maliciously

Digitized by Google

killed the turkeys and in criminal disregard of the rights of the owner. The defendants offered no testimony, and at the close of the state's case, asked the court to instruct the jury to return a verdict of not guilty.

While there was some conflict in the state's testimony as to the ownership of the turkeys, there was sufficient evidence to support the ownership alleged in the information, and the question on this appeal is, whether the state's evidence was sufficient to make a case of larceny.

In the early case of Witt v. State, 9 Mo. 671, Judge SCOTT defined larceny as follows: "Larceny is defined to be the wrongful taking and carrying away of the personal goods of any one from his possession with a felonious intent to convert them to the use of the offender without the consent of the owner. The taking must be done *animo furandi,* or as the civilians express it, *lucri causa.* . . . To constitute this offense, therefore, in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it to the offender's use."

There is an irreconcilable conflict in the authorities whether, to constitute larceny a taking, must be with a view to some benefit or gain to the wrongdoer, or, as it is sometimes said, whether the taking must be *lucri causa.* In 25 Cyc. 52, it is said: "According to the weight of authority the felonious intent required for larceny is not necessarily an intent to gain advantage for defendant; an intention to deprive the owner of his property is enough. But in a few cases it is held necessary to show that defendant took for his own purpose or *lucri causa.*"

In 18 Am. and Eng. Ency. of Law (2 Ed.), 504, the author does not agree with Cyc. as to the weight of authority, and says: "The question whether, in order to constitute larceny, there must be an intent on

Digitized by Google

the part of the taker to appropriate the goods, that is, to derive some benefit or gain to himself, an intent which is usually designated as the *lucri causa,* has been and still is the subject of conflicting decisions. The preponderance of authority is to the effect that such intent is necessary, though many authorities take the opposite view, and hold that a mere intent to deprive the owner of his property is sufficient."

In McClain's new work on Criminal Law, section 568, it is said: "Some expressions have been used in text-books and opinions indicating that, to constitute larceny, the taking must be with a view to the benefit of the wrong-doer, or, as it is sometimes expressed, the taking must be *lucri causa.* There may be some reason for this doctrine in the attempt to distinguish between larceny and malicious trespass, and for the purpose of making such distinction it may be proper to say that an intent merely to deprive the owner of his property is not sufficient in larceny; but where the intention of the wrong-doer is to deprive the owner of his property by taking it from him, and such intention is carried out by an act which constitutes a taking and carrying away, it certainly ought to be immaterial whether the motive of the wrong-doer is benefit to himself or only injury to the owner, and the great weight of authority supports such a proposition. For instance, where the prisoner, for the purpose of preventing a horse from being used in evidence against an accomplice took it from the prosecutor's stable and killed it by backing it into a coal pit, it was held that the offense was larceny; and this doctrine has been generally followed in the United States. But it still is true that there must be an intent to take the property and not merely to injure it."

In 3 Greenleaf on Evidence (15 Ed.), sec. 157, the author says: "A distinction is to be observed between larceny and mere trespass, on the one hand, and malicious mischief on the other. Where the prisoner's sole

Digitized by Google

object was to destroy the property, from motives of revenge and injury to the owner, and without the expectation of benefit or gain to himself, this also is not larceny, but malicious mischief. For it seems to be of the essence of the crime of larceny that it be committed *lucri causa,* or with a motive of gain or advantage to the taker; though it is not necesary that it be a pecuniary advantage."

In 2 Bishop's New Criminal Law, sec. 846, it is said: "This discarding of the *lucri causa* does not render every sort of evil intent adequate. For example, it does not transmute malicious mischief into larceny. And the purpoe to deprive the owner of his goods by a wrongful act is not alone the felonious mind we are considering."

While as above stated, the authors in Cyc. and the Am. and Eng. Ency. of Law do not agree as to the weight of authority on the proposition, both of them place Missouri as holding that it is necessary, to constitute the offense, that the taking must have been *lucri causa,* and cite the following cases: Witt v. State, supra; State v. Conway, 18 Mo. 321; State v. Littrell, 170 Mo. 13, 70 S. W. 143.

In the Conway case, the court said: "The taking must be done *animo furandi* or *causa lucri.*" And we believe it has been generally understood by the Bench and Bar of this state that in order to constitute the crime of larceny, it is necessary that the goods be taken with the intent, not only to deprive the owner of the use thereof, but to convert them to the use or benefit of the defendant.

In 18 Am. and Eng. Ency. of Law (2 Ed.), 508, it is said: "According to the rule that the *lucri causa* is an essential element of larceny, it is held that taking and carrying away the goods of another merely for the purpose of destroying them in a spirit of wantonness, does not constitute larceny, though it may constitute another crime."

Digitized by Google

That the mere unlawful killing of animals has not been considered larceny in this state, is supported by the fact that we have a statute (section 4541) providing that such act is larceny, if committed with the intent to steal or convert the carcass or skin or some part of the animal so killed.

According to the state's testimony, the act of the defendants in killing the fowls of the prosecuting witness was malicious, cruel and without a single mitigating circumstance. It is difficult to understand why persons old enough to have any judgment on a question of right and wrong, would commit such a dastardly act. It does not appear that appellants had any personal feeling against the prosecuting witness, but that they killed the fowls simply because they had an opportunity to and could do so. Language is wholly insufficient to properly express the contempt that any fair-minded person has for such conduct. While this is true, the defendants must be prosecuted for the crime they have committed, and not for any other. We are of the opinion that they are not guilty of larceny, and therefore, the judgment must be reversed, and it is so ordered. All concur.

---

## STATE OF MISSOURI ex rel., PRESTON HALBERT, Respondent, v. HARRY CLYMER et al., Appellants.

**Springfield Court of Appeals, June 3, 1912.**

1. **SCHOOLS: Attending School: Non-Residents: Child Not Supported by Parents.** In a mandamus proceeding against directors of a school district to compel them to permit the relator's grandson to attend the public schools in said district, in which district the relator was a taxpaying citizen, it appeared that the parents of the boy resided outside the district, but that the grandfather had made an arrangement with the boy's father to take the boy to live with him and since then had controlled

Digitized by Google

him, purchased his clothing and furnished him with the necessaries of life, and the boy's parents had contributed nothing to his support. *Held*, that under the fourth clause of section 10785, Revised Statutes 1909, the grandson was entitled to attend school in relator's district.

2. ———: ———: ———: ———. Section 10785, Revised Statutes 1909, is not ambiguous and plainly provides that children, who are unable to pay tuition and whose parents are not contributing to their support, shall have the privilege of attending school in any district in which they may have a permanent or temporary home and it will be noticed that the privilege is granted regardless of the residence or domicile of the parents.

Appeal from Crawford Circuit Court.—*Hon. L. B. Woodside*, Judge.

AFFIRMED.

*Harrison & Norvell* and *Harry Clymer* for appellant.

(1) Under the statute only *bona fide* residents of a school district are entitled to attend school without paying tuition, unless they come within the exceptions therein contained. R. S. 1909, sec. 10785; Lexington ex rel. v. Bank, 130 Mo. App. 692; Binde v. Klinge, 30 Mo. App. 285. (2) In order to constitute a minor resident for school purposes the parent or guardian must be a resident of the school district. State ex rel. v. Smith, 64 Mo. App. 213; School District v. Matherly, 84 Mo. App. 140. (3) The residence of the parents being in Greene county, the legal residence of the minor is in Greene county and not in Crawford county. Lacy v. Williams, 27 Mo. 280; Lewis v. Costello, 17 Mo. App. 593; De Jarnett v. Harper, 45 Mo. App. 415. (5) Primarily the duty to support, maintain and educate the children rests upon the father. 29 Cyc. 1606; Chester v. Chester, 17 Mo. App. 657; Rankin v. Rankin, 83 Mo. App. 335.

Digitized by Google

*Farris & Watson* for respondent.

(1) The common school system of this state is a creature of the state Constitution and the laws passed pursuant to its command. The right of children to attend the public schools and of parents to send their children to them is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the state and a right belonging to citizens of this state as such. Lehew v. Brummell, 103 Mo. 550. (2) A citizen is one who as a member of a nation or body politic of a sovereign state owes allegiance to and may claim reciprocal protection from its government. 7 Cyc. 133; State v. County Court, 90 Mo. 598. (3) A family is a collective body of persons who live in one house under one head or manager. Grocery Co. v. Monroe, 142 Mo. 170; 19 Cyc. 452. (4) When one stands *in loco parentis* to another he becomes responsible for the maintenance and education of the latter, on the principle that the child is held out to the world as part of his family. Schoulers Domestic Relations (5 Ed.), 370. (5) The father may surrender the care, custody and control of his child to another, subject to his own right of revocation. In the matter of Scarrit, 76 Mo. 582; Weir v. Marley, 99 Mo. 495. (6) This section 10785, has never been passed upon in its present form and we will look to the construction given it before the clauses in dispute were engrafted upon it. A careful examination of the construction then given to this section and the proper application of the rules there advanced, conclusively give the grandson in this case school privileges in the Steelville District. Binde v. Klinge, 30 Mo. App. 285.

GRAY, J.—This action was instituted on the 19th day of February, 1912, by the respondent filing his petition in the circuit court of Crawford county, ask-



Digitized by Google

ing that an alternative writ of mandamus issue to the appellants, who constituted the board of directors of the Steelville school district, commanding them to permit Preston Gibson to attend the public schools in said district. The writ was issued and appellants entered their appearance and filed return thereto. The return admitted appellants had refused to permit the boy to attend the school and justified their action on the ground that he was a non-resident pupil, and refused to pay the tuition fee fixed by the board. The trial court found the issues against the appellants, and awarded a peremptory writ of mandamus, and defendants appealed.

The facts are practically undisputed. Preston Gibson at the time this suit originated, was seventeen years of age, and the relator, his grandfather, a tax-paying citizen of the Steelville school district, and had been for many years. The boy's parents resided at Springfield, this state, and his name appeared in the enumeration list as a school pupil, in that city, for the year 1911. The boy had attended school in Springfield for several years, but during vacations had lived much of the time with his grandfather at Steelville. The relator's wife was dead, but he had an unmarried daughter who kept house for him, and lived with him as a member of his family.

Some time in the summer of 1911, the grandfather asked the boy's father to let him have the boy, promising to send him to school, and to clothe and board him. The testimony preserved in the record on this point is as follows: "Q. State what Mr. Gibson did? A. He asked me, he said, 'Grandpa, do you want Preston, do you really want him,' and I said that I did and he says, 'Well, I will give him to you, you can take him and he can stay with you,' and I says, 'I will take him and treat him as one of the family,' and I says, 'I like Pres, he minds me and he is a good boy to me,' and he says, 'You can have him.' Q. That

Digitized by Google

arrangement that you have testified to is that he is to remain with you as long as you live? A. As long as I live or want him. Q. Or as long as the boy wanted to? A. Yes, sir. Q. No definite time fixed, is there? A. No, sir. I expect him to stay; I don't expect to live very long, I am getting old, I expect him to stay with me until my death. Q. The understanding was that the boy might remain with you as long as he wanted to, is that true? A. No, sir, if he wanted to go away now I wouldn't let him."

Under the above arrangement the boy went to live with his grandfather, who, according to all the evidence, ever since said time, had controlled the child, purchased his clothing, and furnished him with the necessaries of life, and neither his father or mother had contributed anything to his support.

There was some conflict in the testimony as to whether the grandfather had agreed with the school authorities to pay a tuition, but if the child was entitled to attend the school without payment thereof, this question is immaterial.

The rights of the parties must be measured and determined by the provisions of our statutes read and construed with reference to the policy of the state in school matters. The statutory law of the case is found in section 10785, Revised Statutes 1909. This section provides that the board may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same. This part of the statute is followed by the proviso: "That the following children, if they be unable to pay tuition, shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support."

Digitized by Google

As Preston Gibson is not an orphan or bound as an apprentice and both of his parents are living, his right to attend the school without the payment of the tuition, must be authorized by the fourth subdivision, if at all.

The policy of this state is to educate, and to furnish free of charge, good schools for all children of school age, and even to compel the attendance of children thereto. Section 1 of article 11, of the state Constitution, reads: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the General Assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state between the ages of six and twenty years." It is therefore the duty of the courts to liberally construe our statutes relating to schools, and in such a manner as to open, and not to close, the doors of the schools against the children of the state. As said by the Supreme Court of Wisconsin in State v. Thayer, 41 N. W. 1014: "Such children are the wards of the state, to the extent of providing for their education to that degree that they can care for themselves and act the part of intelligent citizens. To secure these ends, laws relating to public schools must be interpreted to accord with this dominant, controlling spirit and purpose in their enactment, rather than in the narrower spirit of their possible relations to questions of pauperism and administration of estates."

While the statute must be liberally construed, we also recognize the fact that it would not be right to permit children living in districts whose taxpayers have neglected or refused to maintain schools to have the benefits free of charge of schools in districts wherein the taxpayers have burdened themselves to erect school houses, employ competent teachers and maintain schools. [Binde v. Klinge, 30 Mo. App. 285.]

Digitized by Google

Prior to 1885 the statute contained none of its present provisos, but simply authorized the board to admit non-resident pupils within the district, and to prescribe the tuition fee to be paid. In 1885 it was amended by adding the proviso: "That orphan children, or any children bound as apprentices, shall have the privilege of attending school in any district in the state of Missouri in which they may find a permanent or temporary home, without paying a tuition fee."

While the statute was in this language, the case of Binde v. Klings, supra, was decided by the St. Louis Court of Appeals. In that case Mrs. Binde, a widow, who had resided in the Hermann school district for more than forty years, applied to the court for an injunction to restrain the directors of that district from refusing the privileges of the school to her granddaughter, Paula Muehl. Paula's father resided in Montgomery county, but she was living with her grandmother at Hermann, under an arrangement made with the child's father, to the effect that she was to live with the grandmother until the latter died or the child married. In fact, the arrangement in that case was substantially the same as the one we are now considering. In passing on the case, Judge THOMPSON held the word "resident" used in the statute, was to be distinguished from the word "domicile," and without the proviso in the statute, if the child had gone to live with the grandmother without any expectation of returning to its parental residence while the grandmother lived, or while the child remained unmarried, and not merely for the purpose of acquiring the privilege of a better school than existed at the domicile of the parent, she might be a resident of the grandmother's school district, although the father resided elsewhere. The court held, however, that the proviso limited the general language, and only permitted orphan children, or children bound as apprentices, to attend schools in districts where they had a permanent

Digitized by Google

or temporary home without paying tuition fees, and said that by admitting certain non-residents the Legislature necessarily excluded the idea that other non-residents were entitled to the privilege.

A careful reading of the Binde case will lead to the conclusion that had the statute then been in its present form, a different judgment would have been rendered.

The statute is not ambiguous, and plainly provides that children who are unable to pay tuition, and whose parents are not contributing to their support, shall have the privilege of attending school in any district in which they may have a permanent or temporary home. It will be noticed that the privilege is granted, regardless of the residence or domicile of the parent.

It seems to us that the evidence clearly brings the case within the fourth subdivision of the statute. The boy, to all intents and purposes, was a resident of the school district, although his domicile may have been at Springfield. He was living in the district as a member of the relator's family, and under an agreement made with his father by which the relator had agreed to take, care for, and educate him. It was not a contract made for the sole purpose of permitting him to attend the Steelville school. The grandparent was aged, and the boy had lived with him a part of the time for more than five years, and undoubtedly there existed between them a degree of affection perhaps equally as strong as that between father and son. The common experience of mankind proves the truth of this statement, and therefore, it needed the testimony of no witness to establish it. But the grandfather did testify that he liked the boy and wanted him to live with him, and it was satisfactory with the father and the son also. There is no claim that the contract was not made in good faith, or that it was not being strictly performed by all parties thereto. The fact that it was

Digitized by Google

not in writing was a matter that the parties alone were concerned about, and no stranger could set it aside or take advantage of the failure to observe formality in its execution.

In McNish v. State ex rel., 104 N. W. 186, Mrs. Dimick applied for a writ of mandamus to compel the school board to permit Iva Dimick to the public school of the city of Freemont without paying a tuition. The mother of the child was a cousin of the relator, and died in the state of Iowa, leaving a husband and other children residing in that state. The relator asked the father to let her have the child, promising to take her to her home in Nebraska, and to educate and treat her as her own child. There was no written contract, but the father consented, and the child went to live with the relator, but was refused by the board of directors the right to attend school in relator's district without the payment of tuition. The statute of Nebraska provided: "Such schools shall be free to all children between the ages of five and twenty-one years, whose parents or guardians live within the limits of said district." The court granted the writ and said: "It is true that the relator had never been appointed by a process of any court the guardian of Iva Dimick, and yet no reasonable mind could deny that she does not stand *in loco parentis* toward the child. When the father found that on account of the death of his wife, his own straitened financial circumstances, and the large size of his dependent family, he was unable to keep the children with him, he yielded to the request of the relator to furnish a home for the child, and to educate and care for it in all respects as if it had been the natural child of the foster mother. Now, the question arises as to whether our statute, is to be narrowly and technically construed for the purposes of shutting the doors of the school houses in the faces of many of the boys and girls, and turning them out into the street and by-ways to grow up in idleness and ignorance, or

Digitized by Google

whether it shall be liberally and broadly interpreted in the spirit of our Constitution, which says: "The Legislature shall provide for free instruction in the common schools of the state of all persons between the ages of five and twenty-five years."

We have not overlooked the point forcibly made in appellants' brief that the Steelville district is largely maintained by tuition fees received from non-resident pupils, but we do not believe that the effect of this decision will be to deprive the school of such fees. This boy did not go to Steelville for the purpose of obtaining the benefit of its schools. While in all probability, the schools of Steelville rank with the other high schools of the state, and afford excellent facilities for the education of the youth, yet it must not be overlooked in this case, that this child's parents live in Springfield, where, no doubt, schools of equal standing are maintained, and there could possibly have been no reason for sending the child to live with its grandfather for the purpose of better school facilities.

An instructive case is State v. Selleck, 107 N. W. 1022. In that case the Governor and the Superintendent of Schools of the state applied for writ of mandamus to compel the board of education of the school district of Lincoln, the capital of the state, to permit their children to attend school without the payment of tuition. As to the Governor, the Constitution of Nebraska, as ours, required him to reside at the seat of government during his term of office. There was no such provision as to the school superintendent. Both of the state officers maintained their legal residences at their former homes, which were not in the city of Lincoln. The court held that their children were entitled to attend the schools, and that the word "reside," contained in their statute, as it originally existed, would not necessarily be construed to mean a legal residence as distinguished from actual inhabit-

Digitized by Google

ance, and that the true test was the motive or intention of the parents when they took up their abode in the school district. And if the family or the person or persons having legal custody and control of children of school age, removed to and lived in a school district, principally from other motives than obtaining the privilege of the schools for their children, even though their stay in the school district is not expected to be permanent, their children should not be deprived of school privileges while so living in the district. On the other hand, if the removal is to the school district for the purpose of obtaining the advantages of the school, without expense to the family, the school authorities may protect the district from such imposition. To the same effect is School District v. Matherly, 84 Mo. App. 140.

We believe the above named cases correctly interpret the law, and we have no doubt of the ability of the trial court to determine, on a hearing, whether the pupil is in the district temporarily, and for the purpose of obtaining the benefits of the school therein, without contributing to the support thereof, or whether he is there under such conditions as entitle him to attend the school free of charge. But regardless of this, for us to hold that Preston Gibson, under the testimony, is not entitled to attend the Steelville school, without the payment of the tuition, is to annul one of the provisions of the statute, and this, we have no right to do.

The judgment will be affirmed. All concur.

Digitized by Google

# H. F. HOPKINS, Appellant, v. CITY OF SPRINGFIELD, Respondent.

**Springfield Court of Appeals, June 3, 1912.**

1. **PRACTICE: Granting New Trial: Excessive Verdict.** In an action for personal injuries to plaintiff's hand, resulting from falling on a defective street crossing, the trial court set aside a verdict of $2500 on the ground that it was excessive. On the trial the plaintiff exhibited his hand to the trial judge. *Held*, that the trial judge had a much better opportunity to observe the extent of plaintiff's injury than did the appellate court, which had only the language of the witnesses describing the injury, and that the judgment of the trial court in setting aside the verdict would not be disturbed.

2. ———: ———: **Discretion of Trial Court: Appeal and Error.** The order of the trial court, granting a new trial, will not be disturbed unless it is made clear from all the circumstances of the case that manifest injustice has been done or that the discretion of the trial court has been abused, and a stronger case should be made to justify the interposition of the appellate court when a new trial has been granted, than when it is refused.

3. ———: ———: ———: ———: **Excessive Verdict.** Appellate courts are slow to interefere with verdicts on the ground that they are alleged to be excessive, for the reason that the judge before whom the case was tried is better qualified than is the appellate court to say whether or not the verdict is excessive.

Appeal from Greene Circuit Court—*Hon. Aldred Page*, Judge.

AFFIRMED.

*F. T. Stockard* and *Frank B. Williams* for appellant.

(1) The discretion of the trial court in granting a new trial is properly exercised only when there is contradictory or conflicting evidence. Bohle v. Merc. Co., 114 Mo. App. 439; Casey v. Transit Co., 186 Mo.

Digitized by Google

229; Bank v. Wood, 124 Mo. 76; Wells v. Andrews, 133 Mo. 667. (2) The amount of damages to be awarded to plaintiff as compensation for such injury is a matter exclusively within the province of the jury to determine. We have no other scales with which to estimate human suffering or value personal injury, than the intelligence of a jury guided by a sense of justice. 29 Cyc. 844; Merrill v. St. Louis, 12 Mo. App. 466; Goetz v. Ambs, 27 Mo. 27; Wells v. Sanger, 21 Mo. 354; Watson v. Harmon, 85 Mo. 446. (3) This rule is subject to but one qualification in personal injuries cases, to-wit, that where the evidence is conflicting and the damages awarded are so manifestly and flagrantly excessive as to indicate at first blush that the jury either disregarded the evidence or acted from passion, bias or prejudice, the trial court may set the verdict aside. 29 Cyc. 842, 843, 849; 2 Sedgwick on Damages (7 Ed.), 660; Welch v. McAllister, 13 Mo. App. 89; Fairgrieve v. Moberly, 29 Mo. App. 153; Brown v. Railroad, 51 Mo. App. 192; Pritchard v. Hewitt, 91 Mo. 547; Goetz v. Ambs, 27 Mo. 28; Richardson v. Firebrick Co., 122 Mo. App. 529; Saller v. Shoe Co., 130 Mo. App. 729; Waechter v. Railroad, 113 Mo. App. 281; McCarty v. Transit Co., 192 Mo. 396; Fischer v. St. Louis, 189 Mo. 567. (3) While it is the rule that the granting of a new trial on the ground of excessive damages is so entirely within the discretion of the trial court that an appellate court will interfere only in the very clearest case of an abuse of that discretion. Morris v. Railroad, 136 Mo. App. 399; Friedman v. Pub. Co., 102 Mo. App. 683; Scheutte v. Transit Co., 108 Mo. App. 186; Choquette v. Railroad, 152 Mo. 266; Fitzjohn v. Transit Co., 183 Mo. 74; Lee v. Pub. Co., 137 Mo. 392. (5) The rule applies only in those cases where the facts in evidence do not justify any other conclusion than that the jury was influenced by passion and prejudice. Hollenbeck v. Railroad, 141 Mo. 97; Perrette v. Kansas City, 162

Digitized by Google

Mo. 238; Mitchell v. Railroad, 125 Mo. App. 1, or where there is a conflict in the testimony and substantial evidence touching the issue appears in favor of the party to whom the new trial is awarded. Warner v. Railroad, 178 Mo. 125; Ordelheide v. Land Co., 208 Mo. 243; Bush v. Railroad, 144 S. W. 1123; Loftus v. Railroad, 220 Mo. 470; Rigby v. Transit Co., 153 Mo. App. 330. (6) And when it clearly appears as it does in this case that a wise discretion has not guided the trial court's action in granting a new trial, the appellate court should interfere and reinstate the verdict. Loevenhart v. Railroad, 190 Mo. 346; Bush v. Railroad, 144 S. W. 1123; Ordelheide v. Barger, 208 Mo. 239; Fitzjohn v. Transit Co., 183 Mo. 78. (7) When the judge placing himself in the jury box, finds that the verdict could have been honestly made, the verdict must stand. McGraw v. O'Neil, 123 Mo. App. 691. (8) For it is with great hesitation that the courts will invade the province of the jury and interfere with a verdict for damages sounding in tort for personal injuries. Drover v. Railroad, 100 Mo. App. 337; Fischer v. St. Louis, 189 Mo. 579; Devoy v. Transit Co., 192 Mo. 221; Edwards v. Railroad, 82 Mo. App. 484; Brown v. Railroad, 51 Mo. App. 193; Morris v. Railroad, 136 Mo. App. 397.

*Leonard Walker,* city attorney, *Fred A. Moon,* assistant city attorney, and *Perry T. Allen* for respondent.

(1) The granting of a new trial addresses itself to the sound discretion of a trial judge, and in its exercise the court is not confined to the grounds enumerated by statute, but he is empowered to grant a new trial on his own motion, whenever he thinks the ends of justice require it, and appellate courts will not disturb the ruling of a trial judge, unless it is plain that the trial judge abused that discretion. Rail-

Digitized by Google

road v. Martin, 32 Mo. App. 597; Wright v. Railroad, 20 Mo. App. 481; Fretwell v. Laffon, 77 Mo. 28; Fair v. Preston, 138 S. W. 73; Findley v. Railroad, 141 S. W. 866. (2) The trial judge has opportunities of observation that the appellate court does not. It often happens that there are circumstances that influence the trial court, which cannot be transferred into cold type, the manner of the witnesses on the stand, the interest in the result of the trial, their prejudice, etc., all of these should induce the greatest caution in overturning the decision of trial judge in granting a new trial. State ex rel. v. Griffith, 63 Mo. 545; Casey v. Transit Co., 186 Mo. 229; Coleman v. Cole, 158 Mo. 257; McCullouch v. Insurance Co., 113 Mo. 606. (3) If it appears to the trial judge the jury was influenced by passion, prejudice or improper motives in rendering the verdict, and their finding is clearly against the weight of the evidence, it is the duty of the trial judge to promptly set aside the verdict and grant a new trial. Bank v. Armstrong, 92 Mo. 265; McCoy v. Underwood, 47 Mo. 187; McDonough v. Nicholson, 46 Mo. 35; Eidenmiller v. Kump, 61 Mo. 340; Partello v. Railroad, 217 Mo. 645; Etlinger v. Kahn, 134 Mo. 497; Fitzjohn v. Transit Co., 183 Mo. App. 68. (4) Appellate courts defer to the ruling of trial courts in the matter of granting new trial. Eidenmiller v. Kump, 61 Mo. 342; McDonough v. Nicholson, 46 Mo. 35; Bank v. Armstrong, 92 Mo. 281.

GRAY, J.—The plaintiff obtained a verdict in the circuit court of Greene county, for $2500, against the defendant city, and the court granted a new trial, on the ground that the verdict was excessive, and plaintiff appealed.

The plaintiff claimed that he was injured by falling on a defective street crossing. At the time he was forty-six years old, and was a common laborer, earning two dollars per day. He testified that while walk-

Digitized by Google

ing on one of the streets of the defendant, and on account of the defective condition thereof, he fell, and by the force of the fall, a nail was driven through the palm of his hand. In regard to the extent of his injuries, he testified that he could not use his hand as well as he could before he was injured, and that it still pained him and at times so severely that he was unable to sleep, and frequently was compelled, on account of the pain, to get out of bed and walk the floor; that for several weeks he was absolutely unable to perform any labor, and during all of said time, suffered intense pain; that he afterwards tried to work, but was unable to. He exhibited his hand to the court and jury, and illustrated to what extent he could use it. His physician testified that the wound healed nicely, and while it would always be a "make-shift of a hand," and not as good as it was before the injury, he could not say it would continue to cause pain.

There was testimony that the nail, in passing through the hand, had broken a bone, and that small parts therefrom had to be removed. The defendant offered no testimony to contradict that offered by plaintiff relating to his injuries.

It has been frequently held by this and other appellate courts of the state, that the order of the trial court granting a new trial will not be disturbed unless it is made clear from all the circumstances of the case that manifest injustice has been done, or that the discretion of the trial court has been abused, and a stronger case should be made to justify the interposition of the appellate court when a new trial has been granted than when it has been refused. [Hawver v. Springfield Traction Co., 154 Mo. App. 452, 134 S. W. 70; Boulware v. Victor Automobile Co., 134 S. W. 7; Fair v. Preston, 138 S. W. 73; Chambers v. Elliott, 143 S. W. 521.]

In Hawver v. Springfield Traction Co., supra, Judge NIXON said: "The law is that courts have large

Digitized by Google

discretionary powers in granting one new trial, and an appellate court will not interfere with such discretion unless it appears to have been unwisely exercised—so unwisely as to amount to an abuse thereof."

The appellant admits the above to be the general rule but says it only applies where there is a conflict in the evidence, but where the evidence is all one way, the appellate court is in as good a position as the trial court was to review the action of the jury. This, we concede, to be correct and supported by authority. [Bush v. M., K. & T. Ry. Co., 144 S. W. 1123.] The rule does apply, however, not only where there is a conflict in the testimony, but where all the evidence is not before the appellate court. In this case there was very important testimony before the trial court and jury that is not before us. We refer to plaintiff's hand. It was seen by the trial judge, who certainly had a much better opportunity to observe the extent to which its use was impaired by the injury complained of, than we are. We have only the language of the witnesses describing the injury, while the trial judge had the injury itself before him. As said by the Supreme Court in Furnish v. Railroad, 102 Mo. 438, 13 S. W. 1044: "Many cases arise in which, at this distance from the trial court room, we feel ourselves disposed to defer to the action of the circuit judge on this point, and to resolve any reasonable doubts on the subject in favor of the correctness of his ruling approving the finding.

"The trial court should, on motion, fearlessly and willingly reduce any verdict to its proper amount when the weight of the evidence indicates it as excessive. That judge has the advantage of forming his opinions from the living realities before him, and the impressions so obtained are far more reliable than those given by any transcript of the record on appeal. We, therefore, give great weight to his rulings on

Digitized by Google

matters depending on the credibility of witnesses, on the physical appearances of parties, and the like."

In McCloskey v. Publishing Co., 163 Mo. 22, 63 S. W. 99, the Supreme Court further said: "While it is true that appellate courts are very slow to grant new trials solely upon the ground that verdicts are excessive, it is also true, that they defer very largely to the action of the trial courts with respect to such matters, and that a judgment is rarely ever reversed upon the ground of the unwarranted exercise of the power of such courts under such circumstances.

"But where it is manifest that a verdict is excessive, the court is remiss in its duty if it does not, upon motion, set it aside and grant a new trial, and this duty rests almost entirely within the province of the trial court, and this court will not interfere with the exercise of such discretion unless it appears to have been unreasonably or arbitrarily exercised."

Also in Kuenzel v. Stevens, 155 Mo. 280, 56 S. W. 1076: "There is no more important power for the promotion of justice than that intrusted to the trial court in granting a new trial. It is a power to be exercised with great care, and no one is so well informed as to how the discretion should be used as the trial judge. It is only when it very clearly appears that a wise discretion has not guided his action, that an appellate court should interfere."

In Roe v. Met. Street Ry. Co., 131 Mo. App. 128, 110 S. W. 611, it is said: "Appellate courts are slow to interfere with verdicts, on the ground that they are alleged to be excessive. The judge before whom the case was tried was better qualified that we are to say whether the verdict was excessive. It is only in cases where the trial judge has abused the sound discretion lodged in him under the law, that will authorize the interference of an appellate court."

In Morrell v. Lawrence, 203 Mo. 363, 101 S. W. 571, it is said: "The learned trial court assigned as a rea-

Digitized by Google

son for granting the new trial that the verdict was excessive. That is a point peculiarly within the province of the trial judge, it is one that he is better qualified to judge than an appellate court, the law puts that important responsibility upon him and it advances the cause of justice when the trial judge courageously performs that duty."

The books are full of statements of the appellate courts to the effect that where the verdict has been approved by the trial court, it will be affirmed, unless it is manifest that the trial judge abused his discretion in failing to set the same aside. As said by the Supreme Court in Casey v. Transit Co., 186 Mo. 229, 85 S. W. 357: "The trial court has a discretion to grant one new trial, and this court will not interfere with its exercise of that discretion, however much it may disagree with that court upon such a ruling, where there is any substantial evidence to support it."

In Phelps v. Zinc Co., 218 Mo. 572, 117 S. W. 705, the plaintiff claimed there was a flaw or hole in the shaft of a piece of machinery which he was using as the servant of the defendant, and on account of said flaw he was injured. It was claimed by the defendant that there was no evidence that the hole or flaw in the shaft so weakened it as to render it unsafe and dangerous. In passing on the question the court said: "While the record shows the shaft was introduced in evidence, yet it was not preserved therein and cannot, therefore, be inspected by this court. Upon this state of the record counsel for respondent contends that appellant is in no position to insist that there was no evidence introduced tending to prove that the hole in the shaft was so deep and broad as to so weaken it as to render it unsafe and dangerous for persons working about it. In our opinion that contention is well taken. The law is well settled that before the defendant can successfully maintain that there was no evi-



Digitized by Google

dence introduced at the trial to support the verdict of the jury, it is incumbent upon him to bring, by the record, to this court all of the testimony introduced at the trial in order that we may view and determine what it does tend to prove or establish. The circuit court is a court of general jurisdiction, and, in the absence of a showing to the contrary, every presumption must be indulged in favor of the regularity and correctness of its acts and rulings."

And so in this case, the trial judge had before him the plaintiff's hand, and therefore, was in a much better position than we are to say whether the verdict was excessive.

The judgment will be affirmed. All concur.

---

## MINERS BANK, Respondent, v. LLOYD BURRESS, Appellant.

**Springfield Court of Appeals, June 3, 1912.**

1. **SPECIAL TAXBILLS: Assignment of Invalid Taxbills: Implied Warranty: Recovery of Purchase Money by Assignee.** The defendant, a contractor, had constructed certain street pavement and received in payment therefor taxbills, which he had assigned to the plaintiff for a valuable consideration. It appeared that the defendant had personally superintended the street paving work but had failed to comply with his contract in regard to the quantity and quality of the material to be used in the pavement construction, and by reason of such failure the taxbills were declared void. *Held*, that the plaintiff as an innocent purchaser of the taxbills could recover from the defendant the consideration price paid for such bills, on the implied warranty of their validity, and because of the entire failure of consideration for which plaintiff's money was paid.

2. ———: ———: ———: ———. When an innocent purchaser of a taxbill and the lien thereof, does not get the lien because it did not exist at the time of its assignment, and was

Digitized by Google

rendered invalid by the wrong of the vendor, he can recover the consideration from the vendor, there being an implied warranty that the thing sold was valid and existing.

3. ———: ———: Recovering Purchase Money: Fraud: Knowledge of Assignor. Where special taxbills issued for paving work, had been assigned by the contractor to the plaintiff, and subsequently the taxbills were declared invalid, *held*, in an action to recover back the purchase price paid the contractor, that it was not necessary for plaintiff to show scienter or knowledge that the defendant knew of the invalidity of the taxbills at the time of his assignment of them to plaintiff.

4. VENDOR AND PURCHASER: Assignment of Claim: Implied Warranty: Recovery of Purchase Money by Assignee. As a general rule the assignor of a claim impliedly warrants that it is valid and that the debtor or obligor is liable to pay it and if in fact the claim is invalid, the assignor is liable to the assignee for the amount paid for the assignment.

5. ———: Sale of Chattel: Failure of Consideration: Recovery Back of Purchase Money. Purchase money paid by a buyer for a chattel may generally be recovered back if there is a total failure of consideration by reason of the goods purchased being wholly worthless.

6. ———: ———: ———: ———: Knowledge of Vendor. The general principle is well settled that when the consideration totally fails where nothing passes by the attempted transfer or conveyance, the amount paid may be recovered back and the application of the principle does not depend upon the question whether the failure arose from ignorance of the law or of fact.

Appeal from Jasper Circuit Court.—*Hon. Joseph D. Perkins,* Judge.

AFFIRMED.

*Clyde Compton* and *C. V. Buckley* for appellant.

(1) There is no implied warranty in a sale of a note or chattel except the (a) vendor owns it, (b) the note is not a forgery, (c) when sold by sample that the bulk will equal the sample. In the sale of a machine for particular use or purpose that it is suited to

Digitized by Google

the purpose for which sold. Otherwise *caveat emptor* is the rule. Norris v. Reinstedler, 90 Mo. App. 629; Lindsey v. Davis, 30 Mo. 406; Machinery Co. v. Foundry Co., 131 Mo. App. 540; 10 Am. and Eng. Ency. Law, sec. 28, p. 127; Otis v. Cullum, 92 U. S. 447; Meyer v. Richards, 163 U. S. 385; Mechem on Sales, sec. 1332; 1 Beach on Mod. Contr., sec. 288; Barnard v. Kellog, 10 Wall. 382; Bridge Co. v. Hamilton, 110 U. S. 112; Matlock v. Meyers, 64 Mo. 531; McCurdy v. McFarland, 10 Mo. 377; Anthony v. Potts, 63 Mo. App. 517; Bulwinkle v. Cramer, 27 S. C. 376; Carson v. Bailey, 19 Pa. 375, 57 Am. Dec. 659; Lord v. Growr, 39 Pa. 88, 80 Am. Dec. 509; Hoffman v. Oats, 77 Ga. 701; Goldrich v. Ryan, 3 Smith, 324; Glass Co. v. Gunter, 31 Fed. 208; Lukens v. Friund, 27 Kas. 664; Ryan v. Ulmer, 108 Pa. 332; Gallagher v. Waring, 9 Wend. 20; Dickinson v. Jordan, 33 N. C. 166. (2) Where one receives bonds in pledge for a loan, in pursuance of a sale thereof by the owner delivered them to the purchaser, collected the purchase money, deducted the amount of its loan and turned the balance over to the borrower, held the purchaser could not recover, even though the bonds were forgeries. Baker v. Anot, 67 N. Y. 448; Orleans v. Platt, 99 U. S. 676; Insurance Co. v. Middleport, 124 U. S. 534; Ripley v. Case, 86 Mich. 261. (3) A mere contract of sale or agreement to sell a chattel does not imply a warranty. Harly v. Iron Works, 66 Cal. 238; Elston v. Friedman, 57 Minn. 70, 58 N. W. 830; McClurg v. Kelley, 21 Iowa 508; Dean v. Mason, 10 Am. Dec. 162; Reynolds v. Palmer, 21 Fed. 433; Davis v. Murphy, 14 Ind. 158; Court v. Snyder, 28 N. E. (Ind.) 718; Baird v. Matthews, 36 Ky. 129; Scott v. Renick, 40 Ky. 63. (4) If there is a defect in the thing sold that the buyer wants to provide against he must take a warranty. Otherwise he takes the risk of defects hidden or open, known or unknown to the seller. Lindsey v. Davis, 30 Mo. 406; McClurdy v. McFarland, 10 Mo.

Digitized by Google

239; Bank v. Hutton, 224 Mo. 42; N. W. v. Niles, 90 Wis. 590; Goulds v. Brophy, 42 Minn. 109; Milwaukee B. Co. v. Duncan, 87 Wis. 120; Seitz v. Ref. Co., 141 U. S. 510; Machinery Co. v. Foundry Co., 131 Mo. App. 548. (5) Instruction No. 4 is wrong. It makes the knowledge of defendant's employee, his foreman on the work, sufficient. As we have seen the knowledge that makes the seller responsible to the buyer for the return of the purchase money, the usury cases, even where that permits a recovery, must be personal knowledge of the seller. Littaner v. Goldman, 72 N. Y. 506, 28 Am. Rep. 171.

*Haywood, Scott & Thomas Dolan* for respondent.

(1) Where a contractor for certain street paving receives in payment therefor taxbills which purport to be liens against certain real estate described and he sells and assigns the taxbills and the lien thereof to an innocent purchaser at the market price and it is afterwards discovered that the taxbills are void and are not liens against the real estate because the contractor had failed to substantially comply with his contract for the street paving, the purchaser, having had no knowledge of such failure of the contractor at the time of the purchase, can recover the consideration paid for the taxbills, there being an implied warranty that the taxbill was what it purports to be, a lien against the real estate it describes. Meyer v. Richards, 163 U. S. 385, 41 L. Ed. 199. (2) When an innocent purchaser of taxbills and the lien thereof does not get the lien because it did not exist at the time of its assignment and was rendered invalid by the wrong of the vendor, he does not get what he intended to purchase and can recover the consideration from the vendor, there being an implied warranty that the thing sold was valid and existing. Wood v. Sheldon, 42 N. J. Law, 421. (3) The seller of a taxbill

Digitized by Google

like the seller of a note, impliedly warrants that it is untainted so far at least as he has been connected with its origin. Bank v. Jarvis, 20 N. Y. App. 229; Thompson v. McCullough, 31 Mo. 224. (4) Implied warranty of validity of chose assigned, in the absence of an express warranty, the assignor of a chose in action, for a valuable consideration, impliedly warrants to the assignee that the chose assigned is a valid, subsisting obligation in his favor to the extent to which it purports to be such. 4 Cyc. 83; Hunt v. Burke, 22 Ga. 129; Tylor v. Bailey, 71 Ills. 34; McCormack v. Reece, 3 Green (Iowa), 591; Winstell v. Hehl, 6 Bush (Ky.) 58; Emmerson v. Claywell, 14 B. Mon. (Ky.) 15; 58 Am. Dec. 645; Hunt v. Armstrong, 5 B. Mon. (Ky.) 399; Hughes v. Brown, 3 Bush (Ky.) 660; Eaton v. Mellus, 7 Gray (Mass.) 566; Sanders v. Aldrich, 25 Barb. (N. Y.) 63; Kingsley v. Fitts, 55 Vt. 592, 38 Am. Rep. 706; Flynn v. Allen, 57 Pa. St. (Smith) 482; Gilchrist v. Hilliard, 53 Vt. 592, 38 Am. Rep. 706; Giffert v. West, 33 Wis. 617; Daskam v. Ullman, 74 Wis. 474, 43 N. W. 321; Thomas v. Lynn, 20 S. E. 878; McGee v. Lynch, 3 Hayw. (Tenn.) 106; Howell v. Wilson, 2 Black (Ind.) 418; Furniss v. Ferguson, 15 N. Y. 437; Hurd v. Hall, 12 Wis. 125. (5) Littauer v. Goldman, 72 N. Y. 506, cited by appellant as authority that it was necessary for the defendant personally to have guilty knowledge of the invalidity of the taxbills at the time he assigned them and the lien thereof, to respondent, is against the weight of authority. It is criticised in the case of Meyer v. Richards, 163 U. S. 385, cited by appellant under point 1 of appellant's brief. Meyer v. Richards, 163 U. S. 385; Wood v. Sheldon, 42 N. J. Law, 425; Benjamin on Sales (7 Ed.), sec. 607. (6) The assignee is under no obligation to institute suit on the chose, when it is invalid, before seeking the return of the consideration paid therefor. Walsh v. Rogers, 15 Neb. 309, 18 N. W. 135. (7) When one purchases what purports and is

Digitized by Google

supposed to be genuine warrants of a county, but which are void because issued without authority, the purchaser upon discovering their true character, may recover the price paid for purchase. Walsh v. Rogers, 15 Neb. 309, 18 N. W. 135; Rogers v. Walsh, 12 Neb. 28, 10 N. W. 468. (8) The measure of the assignée's damages for breach of an implied warranty of validity of the chose is the amount paid the assignor for the chose. Dougherty v. Maple, 4 Bib. (Ky.) 557; Boyd v. Anderson, 1 Over. (Tenn.) 437, 3 Am. Dec. 762; Barley v. Layman, 79 Va. 518; Lawton v. Howe, 14 Wis. 241; 4 Cyc. 83. (9) Where anything is purchased under a material mistake of fact, the consideration may be recovered, whether the mistake be that of both parties or of one alone, and when the mistake is that of one party alone, whether the fact be known or unknown to the other party. Benjamin on Sales (7 Ed.), Bennett, p. 396; Lyle v. Shinnebarger, 17 Mo. App. 66. (10) A sale of what does not exist either in law or fact, is no consideration for a promise to pay for it and if the consideration has been paid it can be recovered back. Myers v. Richards, 163 U. S. 385; Shepherd v. Jenkins, 73 Mo. 510; Thomas v. Knowles, 128 Mass. 22; Dickinson v. Hall, 14 Pick. (Mass.) 217; Lester v. Palmer, 4 Allen (Mass.) 145; Wood v. Sheldon, 42 N. J. Law, 421; Claflin v. Godfrey, 21 Pick. (Mass.) 1. (11) Where the foundation for paving is constructed substantially of less thickness than required by the ordinance, the taxbills are void. Brick Co. v. Hamilton, 51 Mo. App. 120.

NIXON, P. J.—This was an action to recover the consideration paid for seven special taxbills issued to the appellant and assigned to the respondent. The taxbills were issued by the city of Joplin for paving with vitrified brick Wall street from the middle of Third street to the middle or center of Sixth street.

Digitized by Google

The plaintiff recovered judgment for the full amount of the taxbills from which the defendant has appealed.

The respondent is a corporation engaged in the banking business in the city of Joplin. It discounts special taxbills similar to the ones in controversy in this case. The appellant is and for several years has been a contractor, bidding on contracts for street improvements and taking taxbills in payment for his work. The respondent, knowing the appellant had these bills, had them examined by its attorney with a view of purchasing the same, and upon the attorney's favorable report bought them at their face value less five per cent discount, which was the usual market price of taxbills similar to these in the city of Joplin. The transaction was in the usual course, and the taxbills were all in the following form:

"Special Taxbill.

"No. 17. Paving with vitrified brick.

"City of Joplin, Jasper county, Missouri.

"It is hereby certified that the following described real estate in the city of Joplin, Jasper county, Missouri, and owned by William A. Campbell, to-wit: Lot 65 in Murphy's Addition to Murphysburg, an addition to the city of Joplin, Missouri, has been charged with the sum of $225,624, as a special tax to pay for paving with vitrified brick the roadway of Wall street from the center line of Third street to the center line of Sixth street, as declared necessary by Resolution No. 524 and authorized by Ordinance No. 2909, approved July 5, 1907; that the amount above stated has been levied and assessed against said real estate by Ordinance No. 3166, approved March 11, 1908.

"It is further certified that the above described real estate abuts on said street and on the part of same so improved; that the said paving with vitrified brick was done and the material therefor furnished by Lloyd Burress, contractor, to whom this special

Digitized by Google

taxbill is issued and made payable, in accordance with the contract entered into by said contractor and the city of Joplin in the manner provided by law; that the total cost of said improvements was apportioned among the several lots, tracts and parcels of land abutting on said street, and upon the part thereof so improved, in proportion to the front foot thereof and that the amount so charged against said real estate is its lawful share of the cost of said improvements.

"This special taxbill shall bear interest at the rate of eight per cent per annum from thirty days after its date and is a lien against the said real estate, which lien shall continue for a period of five years after the date hereof, unless sooner paid.

"Issued in accordance with the provisions of said last mentioned ordinance this —— day of March 13, 1908.

"HIRAM PHILLIPS, City Clerk.
"Countersigned J. F. OSBORNE, Mayor."

Appellant, as the evidence tends to show, told respondent's vice-president who had charge of the purchase of the taxbills for the bank that he had done the work according to contract. Respondent had no knowledge that appellant had failed to do the work as contracted, and believing the taxbills were valid liens against the real estate described therein purchased $2500 worth of them, paying the five per cent discount as aforesaid. Appellant executed on each of the taxbills the following written assignment: "Assignment. For value received I assign this special taxbill and the lien thereof to Miners Bank, Joplin, Mo. Lloyd Burress, Owner of Taxbill."

The evidence tended to show that the appellant had personally superintended the doing of the work in question and personally knew what was done. The respondent learned of appellant's failure to comply with his contract by the decision of this court in the

Digitized by Google

case of Burress v. Spring, 143 Mo. App. 688, 128 S. W. 27, which was a suit brought by the appellant to collect certain taxbills for paving under the same contract, in the course of which suit the appellant's failure to do the work according to contract was disclosed and the taxbills were held void by this court upon evidence substantially the same as that contained in the present record. When respondent learned the facts in the matter, it tendered back the seven taxbills, assigned them to appellant, and demanded that he return the consideration, which, being refused, this action was instituted to recover the same.

The respondent in its petition alleged in substance that the appellant in doing the work and furnishing the materials in paving Wall street, for which services the taxbills were issued, did not comply with the ordinance (No. 110) of the city of Joplin, nor with his contract in the following particulars: That appellant used only one-half as much river sand as required by the ordinance, and not in the proportions therein required; that the sand was not river sand but "jig" sand, and that it was not six inches thick when tamped as provided by the contract; that the stone provided for by the contract was not flint stone. The petition alleged, among others, the following facts, which the evidence tended to sustain: That believing that defendant had constructed said paving in accordance with his said contract and in conformity with said ordinances of the city of Joplin and that said taxbills were valid and constituted a lien upon the real estate therein described, having no knowledge of any of defendant's failures to construct the pavement in accordance with the said contract and with the general ordinances provided for the same, and acting under the mistake of fact that the defendant had constructed said paving in accordance with his said contract, it purchased the said taxbills.

Digitized by Google

Under this evidence the plaintiff contends that it was an innocent purchaser of the taxbills and that under the law the defendant impliedly warranted their validity and that he had a subsisting lien against the real estate therein described. The appellant contends that there was no implied warranty and hence no liability on the conceded facts; that at most, a concealment of these facts, if relied on for recovery, would have been an implied fraud and for which there is no liability under the law of this state. It is conceded that the petition and instructions do not base respondent's right to recover on any fraud or fraudulent representations and did not require the appellant to know at the time he sold the taxbills that they were defective.

In the absence of an express warranty, the assignor of a chose in action, for a valuable consideration, impliedly warrants to the assignee that the chose assigned is a valid, subsisting obligation in his favor against the debtor to the extent to which it purports to be such. [4 Cyc. 82.]

As a general rule the assignor of a claim impliedly warrants that it is valid and that the debtor or obligor is liable to pay it, and if in fact the claim is invalid, the assignor is liable to the assignee for the amount paid for the assignment. [2 Am. and Eng. Ency. Law, 1090; Daskam v. Ullman, 43 N. W. (Wis.) 321.]

When an innocent purchaser of taxbills and the lien thereof does not get the lien because it did not exist at the time of its assignment and was rendered invalid by the wrong of the vendor, he does not get what he intended to purchase and can recover the consideration from the vendor, there being an implied warranty that the thing sold was valid and existing. [Wood v. Sheldon, 42 N. J. Law, 421.] The plaintiff purchased of defendant a *bona fide* subsisting demand

Digitized by Google

and received a taxbill, prima facie valid, which was in fact absolutely void *ab initio.*

Where anything is purchased under a material mistake of fact, the consideration may be recovered, whether the mistake be that of both parties or of one alone, and when the mistake is that of one party alone, whether the fact be known or unknown to the other party. [Benjamin on Sales (7 Ed.), Bennett, pp. 396, 397.]

The rule seems generally to prevail that the purchase money paid by a buyer for a chattel may be recovered back if there is a total failure of consideration by reason of the goods purchased being wholly worthless.

Under these authorities and many more that might be produced it is apparent that the doctrine of *caveat emptor* has no application to the condition of facts shown in this case, and further, that it was not necessary for the plaintiff to show scienter or knowledge that the defendant knew the invalidity of the taxbills; and the buyer would be entitled to recover the purchase price although the seller was innocent of any fraud and ignorant of the defect. [Boyd v. Anderson, 3 Am. Dec. (Tenn.) 762.]

As stated in the case of Claflin v. Godfrey, 21 Pick. l. c. 14: "The general principle is well settled, that when the consideration totally fails, where nothing passes by the attempted transfer or conveyance, the amount paid may be recovered back. And the application of the principle does not depend upon the question, whether the failure arose from ignorance of the law or of fact."

The plaintiff bargained for a special taxbill. The defendant assigned and delivered to plaintiff what purported to be such a taxbill and a valid subsisting lien for a specified sum on certain real estate therein described abutting on Wall street in the city of Joplin. Instead of getting such an obligation from defendant,

Digitized by Google

he received nothing but a worthless piece of paper which was rendered of no value by reason of defendant's own wrongful acts. In this way the defendant obtained plaintiff's money without any consideration. For a court of justice to sanction such a proceeding under these facts and allow the defendant to retain the plaintiff's money for which he gave nothing would be palpably inconsistent with equity and good conscience. The judgment is affirmed. All concur.

---

## HENRY J. DAVIDSON, Respondent, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

**Springfield Court of Appeals, June 3, 1912.**

1. **RAILROADS: Accident at Crossing: Frightening Team: Failure to Give Statutory Signals: Contributory Negligence: Instructions.** While plaintiff was driving a team, hitched to a buggy, on a public highway, the team became frightened at defendant's freight train, ran away and plaintiff was thrown out and injured. The accident happened near a public crossing. The evidence is examined and *held* sufficient to establish a prima facie case on the part of the plaintiff that the proximate cause of the accident was a failure on the part of defendant's servants to give the statutory signals on approaching the crossing; that the burden of proving contributory negligence was on the appellant and the instructions given, when considered as a whole, are *held* non-prejudicial to defendant.

2. **———: ———: ———: ———: ———: Sufficiency of Evidence.** While plaintiff was driving a team along a public highway and just after passing over a railroad crossing, the team became frightened at a freight train and ran away, threw plaintiff out of the buggy and injured him. In an action for damages plaintiff made a prima facie showing that the proximate cause of his injury was a failure on the part of defendant's servants in charge of the train to give the statutory crossing signals. Defendant pleaded contributory negligence on the part of the plaintiff in failing to look and listen for trains as he approached the crossing. *Held*, that under the evidence this question of contributory negligence was for the jury, GRAY, J., dissents, and holds that under his construction of the testi-

Digitized by Google

mony there was no conflict between the plaintiff's testimony and that of his witnesses, as well as those of defendant's witnesses; that all agreed that the train was in plain view and could have been seen by the plaintiff at any time after it came within a quarter of a mile of the crossing.

3. **EVIDENCE: Photographs.** Although photographs were taken more than a year after the accident, they are admissible in evidence where a witness testifies that there was relatively no change in the surroundings between the date of the accident and the time the photographs were taken.

4. ———: ———: **Physical Facts.** Photographs as evidence stand on the same footing as diagrams, maps or models, and rest to some extent on the credit of the witness, and they are not unimpeachable evidence, nor do they stand on the same basis as physical facts. The weight to be given them is to be determined under the same tests as are applied to other evidence.

5. ———: **Physical Facts: Conflicting with Witness' Testimony.** The law as to the weight to be given to physical facts is fully recognized in this state, to the effect that where the established physical facts and common observation and experience conflict with the testimony of a witness, such testimony must yield and the statement of the witness does not amount to substantial evidence of the facts testified to and cannot be accepted as the basis of a verdict or judgment.

6. **JURY QUESTION: Burden of Proof: Uncontradicted Evidence.** In our state the law seems to be well established that when the allegations of a party are denied and an issue thereby raised, and such party has the burden of proof, and the evidence introduced by such party to sustain the issue on his part is oral, the issue of fact should be submitted to the jury, although the evidence is uncontradicted and unimpeached and even though the opposing party has introduced no evidence.

7. ———: ———: **Negligence: Prima Facie Case: Contributory Negligence: Uncontradicted Evidence.** In an action for damages on account of negligence, where plaintiff has made a prima facie case and under its plea of contributory negligence, the defendant has introduced testimony which is uncontradicted and unimpeached and which if true would be sufficient to overcome the prima facie case of plaintiff, yet in such case it is not the province of the trial court to direct a verdict in favor of the defendant for the question of contributory negligence and the credibility of the witnesses are for the jury. The exception to this rule is where plaintiff's own testimony or the uncontradicted evidence of his witnesses affirmatively shows that he was guilty of contributory negligence.

Digitized by Google

8. ———: ———: ———: ———: ———: **Contributory Negligence: Shown by Plaintiff's Evidence.** A party by introducing witnesses vouches for their credibility and hence the weight and credibility of such testimony is eliminated from the consideration of the jury and therefore when such party, by the uncontradicted evidence of his own witnesses makes a case for his opponent, the court may give a peremptory instruction based upon that testimony.

9. **RAILROADS: Accident at Crossing: Frightening Team: Failure to Give Statutory Signals: Escaping Steam: Evidence.** In an action against a railroad company for injuries caused by plaintiff being thrown from a buggy on account of his team becoming frightened at defendant's train and running away, the plaintiff alleged a failure on the part of defendant to give the statutory crossing signals and also that the escape of steam from defendant's engine was unusual. All the testimony relating to the latter issue was withdrawn from the jury by the plaintiff and the defendant asked the court to instruct the jury to disregard all the testimony relating to the escape of steam. *Held*, this testimony was admissible in support of plaintiff's theory, that his team was frightened and that the court did not commit error in refusing defendant's requested instruction.

10. **CONTRIBUTORY NEGLIGENCE: Sudden Danger: Degree of Care.** When a person is suddenly and without his own fault placed in a place of danger, he is not required to exercise the same degree of thoughtfulness that he is under other circumstances.

11. **JURY QUESTION: Uncontradicted Evidence: Witnesses for Both Parties Testifying to Same Fact.** When plaintiff's witnesses testify to a certain fact, and the witnesses for the defendant testified to the same fact, and there is no conflict in their testimony, there is no issue of fact to submit to the jury. GRAY, J., in dissenting opinion.

Appeal from Barton Circuit Court.—*Hon. B. G. Thurman*, Judge.

AFFIRMED.

*W. F. Evans* and *Mann, Johnson & Todd* for appellant.

(1) The court erred in refusing to sustain defendant's requested instruction in the nature of a de-

Digitized by Google

murrer to the evidence offered at the close of plaintiff's case and again at the close of all the evidence in the case. Sanquinette v. Railroad, 196 Mo. 466; Porter v. Railroad, 199 Mo. 97; Walker v. Railroad, 193 Mo. 478; Mockowick v. Railroad, 196 Mo. 568; Stotler v. Railroad, 204 Mo. 619; Gumm v. Railroad, 141 Mo. App. 306; Schaub v. Railroad, 133 Mo. App. 444; Grout v. Railroad, 125 Mo. App. 552; Holwerson v. Railroad, 157 Mo. 216; Payne v. Railroad, 136 Mo. 562; Hayden v. Railroad, 124 Mo. 567; Kelsey v. Railroad, 129 Mo. 362; Jones v. Barnard, 63 Mo. App. 501; Lien v. Railroad, 79 Mo. App. 475. (2) Plaintiff's testimony is not entitled to any probative force but it is absolutely contrary to the physical facts and under such circumstances the courts have said time and time again that a court will treat as unsaid by a witness that which in the very nature of things could not be as the witness said. Kreis v. Railroad, 148 Mo. 321; Hook v. Railroad, 162 Mo. 569; McClanahan v. Railroad, 147 Mo. App. 386; Kornfield v. Supreme Lodge, 72 Mo. App. 613; May v. Crawford, 150 Mo. 504; Morris v. Kansas City, 117 Mo. App. 298; Lange v. Railroad, 151 Mo. App. 500; Mann v. Const. Co., 151 Mo. App. 586. (3) The court erred in giving plaintiff's instruction numbered 2. Harriman v. Star, 81 Mo. App. 124; Barr v. Kansas, 105 Mo. 550; Railroad v. Stock Yards Co., 120 Mo. 559; Lanrum v. Railroad, 132 Mo. App. 717; Gibler v. Railroad, 129 Mo. App. 93; Blair v. Railroad, 31 Mo. App. 224. (4) The court erred in admitting the testimony of plaintiff repecting the escape of steam and in refusing to give defendant's instruction lettered "E," seeking to withdraw all of the said testimony from the jury. Mueller v. Weitz, 56 Mo. App. 36; Gutzweiler's Admr. v. Lackman, 39 Mo. 91; Wojtylak v. Coal Co., 188 Mo. 287; Grout v. Railroad, 151 Mo. App. 330.

Digitized by Google

*Edwin L. Moore* for respondent.

(1) In considering appellant's first assignment the denial of its demurrer to the evidence, it may be profitable to examine the cases showing the theory on which plaintiff prepared this petition and tried the case. Under section 3140, requiring a signal to be given by locomotives approaching crossings, a collision is not necessary to make defendant liable; but if the omission lures a traveler into a place of danger and his animals are frightened by the train and cause injury, then the omission of the signals is the proximate cause, and the course the unmanageable animals might take is merely incidental and unimportant. Turner v. Railroad, 134 Mo. App. 397; Mitchell v. Railroad, 122 Mo. App. 60; Feeney v. Railroad, 123 Mo. App. 430; Marsh v. Railroad, 104 Mo. App. 580; Morton v. Railroad, 113 Mass. 366; Prescott v. Railroad, 113 Mass. 370; Pollock v. Railroad, 124 Mass. 158. (2) Under this statute it is held that failure of signals and injury make a prima facie case. The law presumes the failure was the proximate cause. Huckshold v. Railroad, 90 Mo. 556; McGee v. Railroad, 214 Mo. 544; McNulty v. Railroad, 203 Mo. 475; Stotler v. Railroad, 200 Mo. 137; Roberts v. Railroad, 113 Mo. App. 9. (3) And when plaintiff once makes a prima facie case, then no matter how much or what kind of evidence defendant may offer, as to his contributory negligence or anything else, and whether plaintiff contradicts it or not, he is entitled to have the jury weigh defendant's evidence, for the jury has the right to reject the whole of it if it sees proper, unless plaintiff himself shows his own contributory negligence, something out of the question here. Gannon v. Gaslight Co., 145 Mo. 516; Mowry v. Norman, 204 Mo. 191; Porter v. Stock Yards Co., 213 Mo. 380; Chinn v. Railroad, 100 Mo. App. 584; Hitt v. Hitt, 150 Mo. App. 638; Bar-



Digitized by Google

ker v. Pub. Co., 152 Mo. App. 722; Loan Co. v. Killian, 153 Mo. App. 111; Milne v. Railroad, 155 Mo. App. 473. (4) Under the foregoing authorities the petition certainly stated a cause of action and at the trial plaintiff sustained it with substantial evidence. That being true a demurrer to the evidence is unavailing. State v. Scott, 214 Mo. 261; Bank v. Redfearn, 141 Mo. App. 386; Aultman v. Organ, 149 Mo. App. 103. (5) Where the evidence is substantial and reasonable minds may differ about it, alleged physical facts are not allowed to break it down as a matter of law. The following cases include photographs, actual measurements, etc., and will be discussed in argument. Phelan v. Paving Co., 227 Mo. 708; Woodward v. Railroad, 152 Mo. App. 475; Goodwin v. Tel. Co., 138 S. W. 943; King v. Railroad, 143 Mo. App. 291; Davis v. Railroad, 46 Mo. App. 185. (6) Any possible omission in respondent's instruction No. 2 as to contributory negligence is fully supplied by the instructions for defendant. Even necessary elements in general instructions, such as proximate cause, etc., may thus be supplied. Asbill v. Joplin, 140 Mo. App. 259; Neale v. McKintrey, 7 Mo. 128; Prewitt v. Martin, 59 Mo. 325; Bradford v. Floyd, 80 Mo. 207; Anderson v. Railroad, 161 Mo. 427; Nephler v. Woodward, 200 Mo. 190; Deschner v. Railroad, 200 Mo. 333; Railroad v. Stewart, 201 Mo. 499; Gibler v. Association, 203 Mo. 222; Carnovski v. Transit Co., 207 Mo. 277; Flaherty v. Transit Co., 207 Mo. 318; Orcutt v. Building Co., 214 Mo. 35; Bell v. Railroad, 125 Mo. App. 668. (7) An instruction is not error for assuming an undisputed fact. Johnson v. Railroad, 77 Mo. 553; Cahill v. Railroad, 205 Mo. 407. (8) An observing but non-expert witness may testify that something is unusual. 17 Cyc. 107; Feeney v. Railroad, 123 Mo. App. 425; Phelan v. Paving Co., 227 Mo. 709; Stotler v. Railroad, 200 Mo. 127. (9) The proximate cause was the omission of the statutory signals and we may

Digitized by Google

trace back through the various incidents to this real cause of the whole calamity, this making the escape of steam merely one link in the chain, even though by itself it might not be negligent. Nagel v. Railroad, 75 Mo. 661; Boggs v. Railroad, 18 Mo. App. 278; Morrison v. Railroad, 27 Mo. App. 434; Shell v. Railroad, 132 Mo. App. 536; Parker v. Transit Co., 108 Mo. App. 465.

NIXON, P. J.—On March 18, 1910, after sundown and about dusk, respondent was driving a team hitched to a buggy on a public highway in Jasper county where the same crossed the track of appellant's railroad, and his team became frightened at appellant's freight train and ran away, and he was permanently injured. He instituted this suit for damages, alleging that the agents and servants of the appellant in charge of the train failed to give any statutory signals for the crossing, and also that they negligently and carelessly permitted an unusual amount of steam to escape from the engine on such highway, thereby frightening plaintiff's team. The suit was instituted in the circuit court of Barton county, and was there tried before a jury on the eleventh day of April, 1911, resulting in a verdict in favor of the plaintiff for five thousand dollars. A motion for a new trial was filed and overruled and the company appealed to this court.

It appears from the evidence that plaintiff was driving north on the public road which runs north and south, and that the railroad track runs southeast and northwest intersecting the public road at an acute angle. Plaintiff was driving two ponies to a single buggy. With him in the buggy was a young man named Shelton who was leading five head of mules belonging to plaintiff. The plaintiff was coming from the south and the train from the southeast. On the east side of the public road was a peach orchard. The plaintiff with his team and the mules passed over the

Digitized by Google

railroad crossing but the animals then became frightened at the train and the team ran away and plaintiff was thrown out of the buggy and seriously injured, one of his legs having to be amputated.

The plaintiff testified that he had crossed the railroad at this crossing eight different times during the fall and winter preceding the time he was injured and that no signals were given for the crossing. He also stated that steam was escaping from the engine at the time it passed the crossing on the day of the accident. The defendant offered no testimony tending to contradict the above facts, and offered no evidence of any of its employees in charge of the train or otherwise that it gave the proper statutory signals when approaching the crossing, and therefore they may be conceded for the purposes of this appeal as being true.

The plaintiff testified at the trial that his mules were not accustomed to trains, and knowing of the public crossing, he was on the lookout for approaching trains; that he was driving about three miles an hour, in a slow trot, and that he both looked and listened for an approaching train after he passed the corner of the orchard and neither saw the train nor heard any signal. That the orchard comes to a V-shape, the point of the V being made towards the crossing by the public road on one side and the railroad on the other; that traveling on the public road, when he had passed the last tree in the orchard, the railroad track would be about twenty-five or thirty feet from him; that he could not see a train approaching the crossing from the southeast because the railroad comes up out of a valley and trains come through a dirt cut which is grown up with weeds, brush and "stuff," and that you cannot see back southeast until you get on the railroad track; that until you get within ten feet of the crossing you positively cannot see a train coming because the weeds, grass and "stuff"

Digitized by Google

will hide it from view. That it is impossible to see the railroad when you pass the last tree in the orchard going towards the crossing because of the cut and of the grass growing on the sides of the same; that you will get within ten feet of the crossing—or from two hundred and twenty to two hundred and thirty feet from the point where you pass the last tree—before you can see; that the cut is not so very deep, but that you have to get where you can look through that cut, and that the weeds and grass growing on the bank prevent you from seeing. He testified that he saw the train when he was about thirty feet from the crossing and eight or ten feet from the track, but that there was a ditch on the west side of the public road which prevented him from turning around, and that he therefore hurried his animals over the track and succeeded in getting across and about thirty feet north of the track as the engine passed and frightened his team, causing the damages aforesaid.

Appellant's principal assignment of error is that the court erred in refusing to sustain its demurrer at the close of all the evidence in the case.

As above stated, the respondent testified that he both looked and listened for an approaching train; that the statutory signals were not given, and that he did not hear the train and could not see it because the weeds and brush and "stuff" growing on the bank between him and the railroad track obstructed his view.

Section 3140, Revised Statutes 1909, provides that servants of railroad corporations in charge of its trains on approaching public crossings shall ring the bell or sound the whistle as therein provided, under a penalty, and also that such corporation for failure to comply with such statute shall be liable for all damages which any person may sustain at such crossing when such bell is not rung or such whistle is not

Digitized by Google

sounded as therein required. [Lloyd v. Railroad, 128 Mo. l. c. 607, 29 S. W. 153, 31 S. W. 110.]

It must be conceded that plaintiff's evidence made for him a prima facie case, and the burden of proving that plaintiff was guilty of negligence directly contributing to his own injury was upon the defendant.

In addition to his own testimony, the plaintiff offered the testimony of Clifton McNallie and of James T. Koonce. Mr. McNallie had lived near the crossing for many years and was living there at the time of the injury and at the time of the trial. On direct examination he testified that on account of the orchard an approaching train could not be seen until the orchard was passed. On cross-examination he testified as follows: "Q. Now, after he had cleared the orchard there would be nothing to prevent his seeing the train if he had looked in that direction? A. No. Q. So when he would be fifty feet at right angles with the railroad, and farther from the crossing, he could both hear and see the train? A. Yes, sir; that is, if he turned around and looked back he could see." This evidence was given by deposition nine months after the accident; and as to such testimony, it was open to the observation of the jury that neither party inquired of him during the taking of his testimony as to the basis of his opinion, or whether he had ever had his attention particularly called to the matters concerning which he testified, or whether he had ever observed as to the obstructions along the right of way which plaintiff claimed obstructed his view on the day of the accident. Mr. Koonce testified that he was working for Mr. McNallie at the time of the accident, but had never examined the crossing particularly until a few days before the trial; that on the day of the accident he saw the train approaching the crossing, and that the whistle was not sounded and the bell was not rung for the crossing; that a few days prior to the trial he was at the crossing, and that standing at

Digitized by Google

a point two hundred and forty-five feet from the crossing and in the center of the highway a train coming from the southeast could be seen one-half mile away, and that he stood at that point and saw a train pass. He stated that he was present on the day when some photographs were taken of the crossing and the wagon road and railroad track near the same, and that the camera for the photographs, at the time they were taken, was at the said two hundred and forty-five feet point.

In behalf of the defendant six witnesses testified, among them being the young man named Shelton who was with plaintiff at the time of the accident and also the photographer who took the photographs referred to by the witness Koonce. These witnesses testified that from a point two hundred and forty-five feet or two hundred and fifty feet south of the crossing the plaintiff could have seen the approaching train for almost one-half mile before it reached the crossing.

In addition to the testimony of these witnesses, three photographs which were taken five days before the trial were offered in evidence after the same had been identified and declared to be correct by Koonce and the photographer. These photographs corroborated the testimony of all the witnesses on this question, except that of the plaintiff, and showed that a person standing two hundred and forty-five feet south of the crossing in the public road could see the bottom of the whistling post one-fourth mile from the crossing, and even the wheels of the cars of a train.

Although the photographs were taken more than a year after the accident, they were admissible in evidence because plaintiff testified that he had been out to the crossing a few days before the trial and that there was relatively no change in the surroundings.

These witnesses for the defendant went to examine the place of the accident at the request of the de-

Digitized by Google

fendant's claim agent, presumably for the purpose of procuring evidence to be used at the trial. Witnesses Gault, Horn and Shelton were at the scene of the accident a few days after its occurrence at defendant's request, but on the witness stand gave no evidence concerning the results of their examination of the locality at that time. The other witnesses for the defendant, as well as these witnesses, were again at the scene of the accident about a year after the accident and only a few days before the trial. At this time (just before the trial) their attention seems to have been more especially directed to a point of observation on the public road about two hundred and fifty feet away—measured south from the crossing. At or near this place the camera was placed and the photographs exhibited in evidence were taken. From this point the witnesses made observations, and they testified that they could see a train approaching from the east for one-half mile—that there were no obstructions in the way. A train was in fact photographed, as shown by the pictures introduced in evidence, one-half mile northwest of Wentworth. One of the witnesses (McIlhenny) walked down the track for one-half mile and looked back along the defendant's right of way and saw the top of a buggy at or near the crossing where plaintiff was injured, standing probably one hundred and fifty feet south of it on the public road.

As we have stated, the burden of proving contributory negligence rested upon the defendant. Why the attention of its several witnesses was not called to the conditions as to seeing the right of way or an approaching train at points other than this one point is not explained. Nor was any of these witnesses asked whether there was any brush, weeds or grass growing along the right of way as plaintiff had testified.

Digitized by Google

After these witnesses had testified and after the photographs were offered in evidence the plaintiff was not recalled for further examination or to point out any inaccuracies in the photographs.

It is contended however by appellant that the testimony of plaintiff that he looked and listened for the train and did not see it is not entitled to any probative force but is absolutely contrary to the physical facts developed in the case and should as a matter of law be declared unworthy of consideration; that the photographs presented the physical facts to the jury and that as the plaintiff's testimony is contradicted by the physical facts, the court should wholly disregard it.

The law seems to be settled that photographs duly verified are admissible in evidence as aids to the jury in arriving at an understanding of the evidence or of the situation or condition or location of objects or premises material or relevant to the issues, but they have not been held, as claimed by appellant, to be unimpeachable evidence, or as standing on the same basis as physical facts. The general rule is that photographs stand on the same footing as diagrams, maps or models and rest to some extent on the credit of the witnesses, in the same way as a map, plat or plan. In careless or inexpert hands, photographs are capable of very serious misrepresentation of the original and their value depends upon their accuracy. They must be shown by extrinsic evidence to be faithful representations of the place or subject as it existed at the time involved in the controversy. In no case has it been held that they are entitled to the same consideration as evidence as conceded physical facts, but the principle is established that they go to the jury for their consideration and that the weight to be given them is to be determined under the same tests as are applied to other evidence. [Fuller v. Robinson, 230 Mo. 22, 130 S. W. 343; Baustin v. Young, 152 Mo. l. c.

Digitized by Google

324, 53 S. W. 922; Wigmore on Evidence, 790; 2 Elliott on Evidence, sec. 1263; Beardslee v. Columbia Twp., 41 Atl. (Pa.) 617; Higgs v. Railroad, 114 N. W. (N. Dak.) 722, 15 L. R. A. (N. S.) 1162.

The law as to the weight to be given to physical facts is fully recognized in this state to the effect that where the established physical facts and common observation and experience conflict with the testimony of a witness, such testimony must yield and the statement of the witness does not amount to substantial evidence of the facts testified to and cannot be accepted as the basis of a verdict or judgment. [Phippin v. Railway, 196 Mo. l. c. 343, 93 S. W. 410; Champagne v. Hamey, 189 Mo. l. c. 726, 88 S. W. 92.]

The evidence offered in this case as to the physical facts is conflicting and hence does not bring it within that class of cases where it is held that when the physical facts surrounding the injury are conceded and consequently one of two conclusions must inevitably be drawn—either that the plaintiff did not look and knowingly drove upon the railroad track and was injured, or that he did look and saw the approaching train and attempted to cross in front of it and was thereby guilty of contributory negligence—and hence recovery would in either case be barred by his contributory negligence. On the contrary, the plaintiff in this case testified that on the day of the accident, weeds, grass and brush were growing along the railroad right of way and which he claims hid from his view the approaching train. Such objects as he testified to were easily removable and could not properly be classed as permanent physical facts. Hence it was not physically impossible for plaintiff to have failed to see the train on March 18, 1910, because of obstructions, and yet that the other witnesses a year afterward could see it on the public road at the point of the orchard. As to whether the conditions existing at the time of the accident were truly stated by plain-

Digitized by Google

tiff was to be considered by the jury in connection with his statement at the trial that he had lately been back there and could not notice any changes—that the location of things was relatively the same—and we think it was the function of the jury to determine these matters of fact in the light of all the evidence in the case, and not a question of law for the court.

In this case the plaintiff by his evidence had admittedly made a prima facie case and thereafter the trial proceeded upon the defendant's plea of contributory negligence. At the conclusion of all the evidence the defendant asked for a directed verdict on the ground that the proof was uncontradicted and unimpeached as to its affirmative defense of contributory negligence and asked the court to declare as a matter of law that it was entitled to a judgment notwithstanding the prima facie case made by the plaintiff. It is to be seen that defendant, as far as its plea of contributory negligence is concerned, occupies the logical position of a plaintiff in the proof of its affirmative defense, and yet it asked the court as a matter of law to pass upon the conclusiveness of the testimony offered upon this issue.

In considering the question thus raised, a distinction is to be recognized between a demurrer to a party's evidence and a directed verdict by the court in its favor. In order to sustain a demurrer to the evidence for failure to make out a prima facie case it is not necessary for the court to pass on the credibility of the plaintiff's witnesses; their credibility is not only assumed, but the probative facts are given every reasonable intendment in order to ascertain the plaintiff's right of recovery. But a verdict for a party peremptorily directed by the court upon evidence mainly oral in cases where the burden of proof is on such party occupies an entirely different relation to the established principles of law. It has often been held in other jurisdictions that uncontradicted oral

Digitized by Google

evidence of a party holding the burden of proof is not sufficient to command a directed verdict where the inferences to be drawn from all the circumstances are open to different conclusions by reasonable men. But in our state the law seems to be well established that when the allegations of a party are denied and an issue thereby raised, and such party has the burden of proof, and the evidence introduced by such party to sustain the issues on his part is oral, the issues of fact should be submitted to the jury, although the evidence is uncontradicted and unimpeached and even though the opposite party has introduced no evidence, because uncontradicted testimony cannot be treated as conceded facts. [Link v. Jackson, 158 Mo. App. 63, 139 S. W. 588, 596.] The jury must determine the credibility of the witnesses and the weight to be given to their testimony. It is not the province of a trial court after a plaintiff has made out a prima facie case to sustain an instruction to the jury to find for the defendant, offered at the close of all the evidence, on the ground that defendant's proof is uncontradicted and is sufficient to overcome the prima facie case which the conceded and admitted facts make for the plaintiff; nor can an appellate court hold that such an instruction under such circumstances should have been given, after a verdict for plaintiff has been sustained by the trial court, without assuming the prerogatives which under our constitution and laws belong to the jury. [Gannon v. Laclede Gas Light Co., 145 Mo. 502, 46 S. W. 968, 47 S. W. 907.]

Our attention has been called to sporadic cases in this state which have held that while contributory negligence is a matter of defense and the burden of proof as to that defense rests upon the defendant, still if it appears without any conflict of evidence from the plaintiff's own case or from the cross-examination of his witnesses *or from other undisputed evidence in the case* that the injured party was guilty of con-

Digitized by Google

tributory negligence, proximately contributing to produce the injury, the court should direct a verdict. [See Church v. Railroad, 119 Mo. 203, 23 S. W. 1056.] But there is another line of cases beginning as far back as Bryan v. Wear, 4 Mo. 106, which hold to the rule as we have stated it, that when the testimony to sustain an issue is oral and uncontradicted, the question is still one for the jury and the court cannot direct a verdict. [Vaulx v. Campbell, 8 Mo. 224; McAfee v. Ryan, 11 Mo. 364; Gregory v. Chambers, 78 Mo. 294; Wolff v. Campbell, 110 Mo. 114, 19 S. W. 622; Schroeder v. Railroad, 108 Mo. 322, 18 S. W. 1094; Mineral Land Co. v. Ross, 135 Mo. 101, 36 S. W. 216; Houston v. Tyler, 140 Mo. 252, 36 S. W. 654; Gordon v. Burris, 141 Mo. l. c. 615, 43 S. W. 642; Hunter v. Wethington, 205 Mo. 284, 103 S. W. 543; Johnson v. Grayson, 230 Mo. 380, 130 S. W. 673; Seahorn v. Bank, 148 Mo. 256, 49 S. W. 886; Hugumin v. Hinds, 97 Mo. App. 346, 71 S. W. 479; Whitson v. Bank, 105 Mo. App. 605, 80 S. W. 327; Bank v. Hammond, 124 Mo. App. 177, 101 S. W. 677; McCrosky v. Murray, 142 Mo. App. 133, 125 S. W. 226; Dyer v. Tyrrell, 142 Mo. App. 467, 127 S. W. 114; Brinkman v. Gottenstroeter, 153 Mo. App. 351, 134 S. W. 584; Link v. Jackson, supra.]

While there is some apparent conflict in the holdings in these cases and the line of cases of which Church v. Railroad, supra, is an example, we take it that the rule as we have stated it is now the settled law of this state. In Gordon v. Burris, supra, the court in commenting upon this question used the following language: "The jury, it is said, must determine the credibility of witnesses and the weight to be given to their evidence, and a court, when it undertakes to pass upon the sufficiency of such evidence to prove a given fact, usurps the province of the jury. This rule has not been uniformly recognized in this state but was declared at any early day and has been generally followed in the later decisions." This language

Digitized by Google

was quoted with approval in Dalton v. Poplar Bluff, 173 Mo. l. c. 47, 72 S. W. 1068. While the case of Gordon v. Burris (or any of the later cases) does not expressly declare that the cases not in line with this holding are overruled, yet they establish the rule which we have just stated so firmly that it is our duty to follow it although there may be other cases apparently out of harmony with these decisions.

There is, apparently, a slight modification of this rule in cases in which the party on whom rests the burden of proof finds that his case is made by the testimony of the other party. This, however, is not in conflict with the rule as we have stated it. A party by introducing witnesses vouches for their credibility and hence the weight and credibility of such testimony is eliminated from the consideration of the jury; and therefore when such party by the uncontradicted evidence of his own witnesses makes a case for his opponent, the court may give a peremptory instruction based upon that testimony. [Mockowik v. Railroad, 196 Mo. 550, 94 S. W. 256.] The only basis on which a peremptory instruction to find for the defendant in this case could be given would be that plaintiff's own testimony affirmatively shows that he was guilty of contributory negligence. We do not think his testimony is of such a character as to warrant a peremptory instruction against him on that issue. Hence the trial court in refusing to give the directed verdict asked by defendant committed no error.

While plaintiff was on the witness stand he testified that as the engine passed over the crossing an unusual amount of steam was escaping. This testimony was offered in support of an allegation to that effect contained in the petition. On cross-examination of the witness it developed that he was not qualified to testify on that subject and the court permitted the plaintiff to withdraw from the jury all the testimony relating to this issue. The defendant asked the court

Digitized by Google

to instruct the jury to disregard all the testimony relating to the escape of steam. This instruction was refused, but at the request of defendant, the court instructed the jury that the testimony that the escape of steam was unusual was withdrawn and to disregard the same in making up their verdict.

When it is remembered that plaintiff was not injured in a collision, but that his team was frightened by the approaching train, then it must be admitted that evidence as to the noise that the train was making and all that happened at the crossing was admissible in support of plaintiff's theory that his team was frightened, and was competent as part of the *res gestae* or facts forming part of the transaction, and we cannot say that the court committed error in not giving the instruction asked by defendant directing the jury not to consider the testimony.

Appellant also complains of plaintiff's instruction numbered two. By this instruction the court told the jury that if plaintiff after becoming aware of the approaching engine could not with safety have turned around and escaped, and that plaintiff was in the exercise of due care at the time, and that failure to give one or the other of the statutory signals was the sole cause of the injury, the verdict should be for the plaintiff.

The plaintiff testified that he could not turn around on account of the ditch, and that he therefore concluded it would be safer to get over the track and he hurried across.

Technically speaking, the instruction is open to criticism although it does require the jury to find that plaintiff was in the exercise of due care at the time and it would have been better had it submitted in general terms the conduct of plaintiff while caught in the place of danger, but the law is that when a person is suddenly and without his own fault placed in a place of apparent danger, he is not required to exercise the

Digitized by Google

same degree of thoughtfulness that he is under other circumstances. The evidence as to the condition of the public road where the accident took place as to whether plaintiff could have turned around was conflicting and therefore properly for the consideration of the jury. The instruction is also assailed by the appellant because it singled out one method of escape and impliedly took from the consideration of the jury the question whether he could have escaped by getting out of the buggy and holding the heads of the ponies. After some hesitation plaintiff finally testified that he could not have held his team under the circumstances. The question at best was pure conjecture as to whether the horses under the circumstances were so frightened that they could or could not be controlled. The court at the instance of defendant gave the following instructions:

"The court instructs the jury that if the plaintiff Davidson at any time before he attempted to cross in front of defendant's train, so close as to cause his team to be frightened and run away, could have by looking or listening for the approaching train seen or heard the same coming, then your verdict must be for the defendant, no matter what other facts you may find and regardless of what is said in any other instruction."

"The court instructs the jury that the duty imposed by the statute upon defendant railroad company to ring its bell or blow its whistle upon approaching a public railroad crossing does not relieve the traveler upon the public highway, and did not relieve the plaintiff of the duty of looking and listening for an approaching train, and that if you further find and believe from the evidence that by looking or listening for the approaching train plaintiff could have seen or heard the same in time to have prevented his team from running away by the exercise of ordinary care on his part, then your verdict will be for the defendant."

Digitized by Google

When the instructions are all considered together on the question, we think the defendant suffered no prejudicial injury.

For the reasons herein appearing the judgment is affirmed. *Cox, J.*, concurs. *Gray, J.*, dissents, and files separate opinion.

## DISSENTING OPINION.

GRAY, J.—In Porter v. Railroad, 199 Mo. 82, 97 S. W. 880, it is said: "It is well settled in this state that when a traveler approaches a railroad crossing he must look both ways and listen for coming trains, and the negligence of the company in failing to give proper signals will not excuse the traveler's duty to look and listen."

It is also well settled that a railroad track is in itself a warning of danger, and one who attempts to cross it must act with care proportionate to the danger, and if the traveler, by looking, could have seen the train approaching, the mere fact that he testifies that he did look and did not see, does not entitle him to have the question submitted to the jury. [Sanguinette v. Railroad, 196 Mo. 466, 95 S. W. 386.]

I agree that in determining whether plaintiff, because of his own negligence, had a case for the jury, defendant's testimony, where controverted, cannot be considered, and that plaintiff is entitled to the full force of all uncontroverted facts and to all his controverted evidence, and is to be allowed every reasonable and favorable inference of fact deducible from all the evidence; also that the question of contributory negligence is for the jury, where the facts are in dispute, and where though undisputed, they are such as to lead the minds of reasonable men to different conclusions. I am also of the opinion the plaintiff, by his own testimony, made a prima facie case, and



Digitized by Google

if he had offered no other witnesses, but had relied solely on his own testimony, his case might have been properly submitted to the jury. When he testified that he could not see the train coming and did not hear it, although he looked and listened, and that no statutory signals were given and he was injured, he made a prima facie case. The question of his contributory negligence was an affirmative defense, and he had the right to have the jury pass upon the credibility of defendant's witnesses, who testified in support of this defense.

The plaintiff, however, did not rest with his own testimony, but offered two other witnesses who testified that the train could have been seen for a half mile up the track by plaintiff at all times while he was on the highway, from the time he reached a point within 245 feet of the crossing until he had passed over the same. In other words, these witnesses testified that from the time the plaintiff came within 245 feet of the crossing, until he had passed over it, he had a plain view down the track for a half mile from the crossing, and could have seen the train coming for that distance. One of these witnesses had lived for thirty-four years in that neighborhood, and was examined by the plaintiff on direct examination for the purpose of showing that he was perfectly familiar with the crossing, and had observed the conditions surrounding it. The other witness had lived five or six years in the vicinity of the crossing, and was well acquainted with the surroundings. As stated in the majority opinion, these witnesses were corroborated by six disinterested witnesses who testified for the defendant, and also by three photographs, the correctness of which plaintiff did not dispute.

It is my contention that when the plaintiff's witnesses testify to a certain fact and the witnesses for the defendant testify to the same fact, and there is no conflict in their testimony, there is no issue of fact

Digitized by Google

to submit to the jury. I give full recognition to the rule that where the plaintiff has testified to certain facts which are contradicted by his own witnesses, that he still has the right to have the jury pass upon his credibility and weigh the testimony and find for him, although to do so is to return a verdict inconsistent with and contradictory to the testimony of his other witnesses.

I do not find in this case, however, any such conflict in the testimony of the plaintiff and his witnesses. The plaintiff testified as follows:

"Q. When you travel along that public road west of the orchard and as you get further north, state how the obstruction of the trees is then, whether you can see better than when you are further south, or worse, as you get up nearer the north end of the orchard? A. You can't see the train coming at all.

"Q. Why not? A. Well, it is a valley back there.

"Q. Back where? A. Back; about a half a mile back there is a valley there.

"Q. Public road or railroad? A. I mean on the railroad. There is a valley there, and trains come right up out of that dirt cut, and that cut is growed up with weeds and grass and stuff, and you can't see back that way for that until you get on the right of way; growed up with weeds and brush and stuff, and it is kind of a little cut there, and you couldn't see the train no distance unless you got up onto the main track on the railroad; then you could look straight down the track and see it, but if you got out ten feet to one side you positively couldn't see no train coming, because the grass and weeds and stuff there will hide the view of it.

"Q. Now, when you got to that point I have spoken of, that would be due west of the last three? A. Yes, sir.

"Q. Going a little further north of that, just

Digitized by Google

passing the last tree, could you then, by turning around, see back down the track? A. No, sir.

"Q. Because of these things you have mentioned? A. Yes.

"Q. How far on north in the usable part of the public road before you can see any distance down the track? A. You will get in ten feet of the crossing before you can see any distance at all. You will get 220 or 230 feet north along the right of way before you can look back and see the train coming. You have got to get where you can look through that cut, because—it is not so very deep, but you take weeds and grass that grows up on that bank, will prevent you from seeing. . . .

"Q. In coming towards the crossing, within three or four hundred feet of the crossing, southeast, would it be an up grade or down grade, approaching the crossing from the southeast? A. Take it a half a mile south and it is in a valley. After it leaves that it comes to a little grade and on to a level.

"Q. About how far does that level begin from the railroad crossing? A. Well, I couldn't say. It is not very far, though.

"Q. Well, what is your mind of 'not very far?' A. Well, I could'nt say as to that."

On cross-examination, he testified:

"Q. You took no measurements of any kind? A. No, sir.

"Q. There was another road crossing just like that right down there—down there a half a mile? A. Yes.

"Q. And the train crossed that crossing before it crossed that crossing where your team was scared? A. Yes.

"Q. How is the road, up grade or down grade, from your crossing to that crossing? A. About level —I don't know."

Digitized by Google

It will be noticed from plaintiff's testimony that he ascribed his inability to see the train coming, to a dirt cut which was covered with weeds and grass, and that he could not see the approaching train until he got to a point where he could look through that cut. He did not undertake to say at what distance the cut was from the crossing, although he was examined on both direct and cross-examination on this material point. He simply said he did not know how far it was; that he had made no measurements, and it was not very far. All the testimony tended to show that this cut was very close to another crossing, which was a half mile from the crossing where plaintiff was injured. If the burden had been on plaintiff to establish the fact that he could not have seen the train coming a quarter of a mile from the crossing, his testimony would have wholly failed to do so. This being true, there was absolutely no conflict between the plaintiff's testimony as a witness in his own behalf, and the testimony of his other witnesses who testified for him, and therefore, it may be said that the testimony of plaintiff's witnesses, as well as those of the defendant, all agreed that the train was in plain view and could have been seen by the plaintiff at any time after it came within a quarter of a mile of the crossing.

In Richey v. Woodmen of the World, 146 S. W. 461, the Kansas City Court of Appeals, in an opinion by Judge JOHNSON, held, that where the witnesses of a party are supported by the witnesses of an adverse party, the uncontradicted facts must be deemed proved, and there is no issue for the jury. It is further held in that case that where the defendant relies on an affirmative defense, that such defense may be so clearly and indisputable established that its existence should be accepted by the court as proved in law, and where all the evidence in the case is of such character that it affords no room for reasonable controversy,

Digitized by Google

there can be no issue, and therefore, nothing concerning such fact for the jury to determine.

As I construe the majority opinion, it recognizes the correctness of the rule declared by the Kansas City Court of Appeals in the Richey case, and therefore, our differences are confined to the proper construction to be given plaintiff's testimony. My associates are of the opinion that he did testify that he could not see the train coming, because of certain obstructions, while as I construe his testimony, he did not testify that such obstructions were within a quarter of a mile of the crossing. If I am correct, then the case falls within the rule of the Richey case, and the judgment should be reversed and the cause remanded.

---

## STATE OF MISSOURI, Respondent, v. FRANK BROWN, Appellant.

**Springfield Court of Appeals, June 3, 1912.**

1. **APPEAL AND ERROR: Bill of Exceptions: Failure to Sign Bill of Exceptions.** On an appeal in a criminal case it appeared that the bill of exceptions was never signed by the judge of the court in which the case was tried and was wholly unauthenticated in this respect, and no substantial error appearing in the record proper the judgment was affirmed.

2. ———: ———: ———. The statutes provide that a bill of exceptions shall be signed and in case of the judge's refusal to sign the bill on the ground that it is untrue, he shall so certify thereon the cause for such refusal, and the statute provides how the bill may be signed by bystanders. A bill of exceptions not signed at all is a nullity.

Appeal from Christian Circuit Court.—*Hon. John T. Moore*, Judge.

AFFIRMED.

*J. S. McPherson* and *T. J. Delaney* for appellant.

*Fred W. Barrett* for respondent.

Digitized by Google

NIXON, P. J.—Defendant was tried and convicted in the circuit court of Christian county charged with having violated the Local Option Law alleged to be in force in said county and his punishment was assessed at a fine of four hundred dollars. Defendant has appealed. The case was submitted to this court upon the record and what purports to be a bill of exceptions. The bill of exceptions was never signed by the judge of the court in which the case was tried and stands in this court wholly unauthenticated in this respect. Sections 2028 and 5245, Revised Statutes 1909, require that the bill of exceptions be signed, and section 2030, Revised Statutes 1909, provides that if the judge refuse to sign the bill on the ground that it is untrue, he shall certify thereon under his hand the cause for such refusal, and the succeeding section provides how the bill may be signed by bystanders. A bill of exceptions not signed at all is a nullity. [Smith v. Railway, 55 Mo. 601; Klotz v. Perteet, 101 Mo. 213, 13 S. W. 955; Garth v. Caldwell, 72 Mo. 622; Reno v. Fitz Jarrell, 163 Mo. 411, 63 S. W. 808; Roberts v. Jones, 148 Mo. 368, 49 S. W. 985.] There is nothing before us, therefore, except the record proper which we have carefully examined as we are required to do. [Sec. 5312, R. S. 1909; State v. Donohue, 139 Mo. App. 639, 124 S. W. 42; State v. Benton, 163 Mo. App. 39, 145 S. W. 833.] The information is in the approved form and sufficiently charges the offense of which the defendant was convicted. The record shows that the defendant was duly arraigned and entered his plea of not guilty. A trial was had by a jury regularly impaneled, and a verdict of guilty rendered, assessing the punishment as hereinbefore stated. Finding no substantial error in the record before us, the judgment of the trial court is affirmed. All concur.

Digitized by Google

# A. CRIDER, Appellant, v. E. D. HAYNES et al., Respondents.

Springfield Court of Appeals, June 3, 1912.

1. APPEAL AND ERROR: Points and Authorities: Complying with Rule. An appellant in the Springfield Court of Appeals, should comply with Rule 18, which requires an enumeration in his brief of the points relied on, together with the citation of authorities appropriate under such point, and a failure to comply with such rule carries penalties contained in the rule and in Rule 21.

2. ———: Demurrer to Evidence: Motion for New Trial: Saving Exceptions. Where appellant complained of the action of the trial court in giving a peremptory instruction directing a verdict for the defendant, and his abstract does not show that he saved any exception to such action, neither did it appear that appellant saved any exceptions to the action of the trial court in overruling its motion for a new trial, and the record proper is free from material error, the judgment will be affirmed.

Appeal from Greene Circuit Court.—*Hon. Alfred Page*, Judge.

AFFIRMED.

*N. B. Wilkinson* and *J. L. Bess* for appellant.

*O. F. Wayland* and *Green & Green* for respondent.

NIXON, P. J.—This was an action brought in the circuit court of Howell county, a change of venue being thereafter granted to Greene county. After plaintiff introduced his evidence, defendants filed a demurrer which was sustained by the court and the jury was instructed to return a verdict for the defendants which was done. The only question that the plaintiff claims

Digitized by Google

was involved was whether he had made out a prima facie case under the pleadings. Plaintiff's petition was based upon a contract with defendants. The plaintiff alleged in his petition that defendants agreed that if he would buy a "Swift's 1904 Washer Contract" for the sum of fifteen hundred dollars, and if said washer contract was thereafter sold the plaintiff was to have the proceeds of such sale. To the petition the defendants filed a general denial.

The appellant in this case has not complied with our Rule 18 requiring appellant to enumerate the points relied on together with a citation of authorities appropriate under each point, and that appellant's brief shall distinctly and separately allege the errors committed by the trial court. Respondents have not filed a brief. We have as our only guide as to what matters are to be considered the following statement at the end of appellant's abstract under the heading, "Argument:" "After reading the record in this case, we deem an argument useless. The facts so clearly conform to the pleadings and the evidence so conclusively sustains all the material allegations therein that we respectfully submit that the decree should be reversed." The provisions of Rule 18 to which we have referred carry penalties contained in the rule and in Rule 21. However, there are more serious difficulties in the way which go to the very right of this court to pass upon the matter complained of. Our examination of appellant's abstract shows that at the close of plaintiff's evidence defendants asked a peremptory instruction directing a verdict for the defendants because the plaintiff had failed to make out a prima facie case which said instruction was given by the court, and that a verdict was rendered in defendants' favor and final judgment entered thereon. To this action of the court the plaintiff neither made nor saved any exception so far as his abstract shows. Afterwards the plaintiff filed a motion for a new trial which was duly

Digitized by Google

overruled by the court, to which plaintiff saved no exception. Hence none of the errors complained of or grounds assigned in said motion were properly preserved for consideration in this court. [State v. Harris, 216 Mo. 392, 115 S. W. 968.] There is consequently nothing for review except the record proper. On examination we find it free from material error. The judgment is accordingly affirmed. All concur.

Digitized by Google

# INDEX.

BY T. E. FRANCIS.


ACCORD AND SATISFACTION.

1. **Burden of Proof: Receipt Construed.** Where a cement walk was not laid in accordance with the specifications, a receipt for a less amount than the contract price, reciting that the contractor guaranteed the work for two years, does not on its face completely displace the contractor's prior obligation to perform the work in accordance with the specifications, or reveal a settlement on account of the breach of that obligation, so as to shift the burden on the owner to show, in an action for damages for the breach, that such damages were not included in the settlement, and hence the burden to prove they were so included rested on defendant. Investment Co. v. Bernardnon, 384.

2. **Nature: Burden of Proof.** The plea of accord and satisfaction is one of confession and avoidance, and ordinarily the one pleading it has the burden of proof to sustain it. Ib.

3. **Offer of Settlement: Acceptance in Entirety: Equity.** Where a sum of money and promissory notes were left by the debtor with one member of a creditor firm with the understanding that they were to be received in full settlement of an account against the debtor, it being understood that the money and notes were left for the approval of another member of the firm, and the firm appropriates the money and credits the same on the debtor's account and after the notes are past due, attempts to repudiate the transaction, so far as the settlement and notes are concerned, a court of equity will not permit such repudiation, for it was the duty of the creditor to either receive the notes and money tendered in settlement of the account, for which they were offered, or reject the offer in its entirety. Mining Co. v. Coyne, 492.

ACTIONS. **See Jurisdiction, 1, 2.**

ADMINISTRATION. **See Executors and Administrators.**

ADMINISTRATORS. **See Executors and Administrators.**

ADOPTION.

**Children May be Adopted by Unmarried Person.** The general law is that where the statute does not make any restrictions, an unmarried person may legally adopt a child. Hegberg, Admr. v. R. R., 514.

AGENCY. **See Loan Agents; Real Estate Brokers.**

ANIMALS. **See Larceny; Railroads, 11, 12, 13.**




Digitized by Google

APPEALS. See Appellate Practice, 22, 23, 24; Executors and Administrators, 2, 4; Justices' Courts, 1, 4.

APPELLATE PRACTICE. See Appeals; Crimes and Punishments, 3, 4, 7, 10; Damages, 3; Fraud and Deceit, 4; Justices' Courts, 2; Levee Districts, 7; Loan Agents, 1; Mortgages and Deeds of Trust, 2; New Trial; Pleading, 2, 3, 6; Railroads, 28; Trial Practice, 4; Witnesses, 3.

1. **Record: Remarks of Counsel: Bill of Exception.** Objections to remarks of counsel in the argument to the jury cannot be made a part of the record by affidavits of persons, who heard the argument, in support of a motion for a new trial. The bill of exceptions must recite what occurred as the trial progressed. Lemmons v. Robertson, 85.

2. **Necessity of Motion for New Trial.** Where a motion to require the contract, forming the basis of the action, to be filed, is overruled and no further pleading having been filed, judgment is entered and the action of the court in overruling the motion is preserved in a bill of exceptions, a motion for a new trial is not necessary in order to have the cause reviewed in the appellate court. Hess v. Mfg. Co., 153.

3. **Same: Record Proper.** A ruling on a demurrer or motion that strikes at the sufficiency of the petition, or that challenges the sufficiency of the steps taken to compel the other party to answer or be in default, is a ruling that relates to the record proper, and where such ruling is saved and preserved in a bill of exceptions, it may be taken to the appellate court for review. Ib.

4. **Affidavit for Appeal: Unauthorized Person Making Affidavit.** An affidavit for appeal by a party not authorized by the statute to make it, is not merely irregular but is a nullity and places the party taking the appeal in the same position as he would be if the appeal had been granted without any affidavit being filed. State v. Birron, 212.

5. **Trying Case De Novo: Action at Law: Equity.** In an action at law the appellate court is not authorized to try the case *de novo* and reject the incompetent evidence, as it might do in a suit in equity. Hatch v. Bayless, 216.

6. **Error of Trial Court: Presumptions: Prejudicial Error.** Errors of a trial court are presumptively prejudiced and it devolves upon the party asserting their harmlessness to show such fact affirmatively or the presumption will prevail. Ib.

7. **Objections to Testimony: Depositions.** The objections of appellant to the question and answer of a witness offered in the form of a deposition and covering the general reputation of both parties to the action is *held* to be sufficiently specific and to be in fact two objections, one striking at the testimony covering defendant's reputation and the other as to the reputation of the plaintiff. Ib.

8. **Same: Bill of Exceptions: Immaterial Error.** Where appellant has made two objections to the admission of the question and statement of a witness in a deposition and after the objections the bill of exceptions contained the statement, "which objection was overruled by the court," the fact that the letter "a"

Digitized by Google

APPELLATE PRACTICE—Continued.

was omitted from the word "objection" is wholly immaterial. Ib.

9. **Same: Exceptions.** Where two objections are made to the question and answer of a witness in a deposition and the court by one ruling overrules the objections, one exception to such ruling is sufficient under the provisions of sections 2028 and 2029, Revised Statutes 1909. Ib.

10. **Admitting Incompetent Evidence: Presumptions.** Where a trial judge sitting without a jury permits incompetent evidence to be given it is fair to assume that he gave weight to such evidence in the formation of his judgment. Ib.

11. **Objections: Time for Making.** A party will not be permitted to speculate on his chances and wait until the witness has answered the question before making his objection, but this rule cannot be applied with the same effect where the evidence is given in the form of a deposition. Ib.

12. **Trial Without Jury: Error in Admitting Evidence.** While appellate courts do not try a law case *de novo*, yet when the case was tried before the court without a jury, they do not attach the same importance to error in the admission of testimony that they do where the trial was by a jury. GRAY, J., in dissenting opinion. Ib.

13. **Rulings on Motions: Review: Necessity of Exception.** Orders sustaining plaintiff's motion to compel defendant to produce evidence, and overruling defendant's motion to vacate that order, cannot be reviewed unless embraced in the bill of exceptions; neither can they be reviewed unless an exception was saved at the time they were made, although they were made a ground of objection in the motions for new trial and in arrest of judgment. Paul v. Western Union, 233.

14. **Constitutional Question: Necessity of Exception.** While a constitutional question may be presented for the first time in the motion for new trial, when that is the first opportunity offered for its presentation, a constitutional question based on the sustaining of plaintiff's motion to compel defendant to produce evidence cannot be reviewed on appeal, when no exception was reserved at the time the ruling was made and the question was raised for the first time in the motions for new trial and in arrest of judgment. Ib.

15. **Invited Error.** Appellant will not be heard to complain on appeal that respondent failed to adduce evidence to sustain a material issue, where evidence offered by respondent, tending to sustain such issue, was rejected, on appellant's objection, for immateriality. Ib.

16. **Conclusiveness of Verdict.** The credibility of witnesses and the probative value of testimony are for the trial court sitting as a jury, and its determination will not be reviewed on appeal. Ib.

17. **Questions Reviewable: Moot Questions.** The appellate court will not determine moot questions. Detoul v. Yeater, 245.

18. **Misconduct of Counsel: Review: Sufficiency of Exception.** Alleged misconduct of counsel in argument cannot be reviewed in

Digitized by Google

APPELLATE PRACTICE—Continued.

the absence of an exception to the ruling of the court thereon; a statement by objecting counsel, "I except to that remark" (meaning that he *objected*), on which objection the court ruled that counsel should proceed with his argument, followed by a statement by objecting counsel, "I submit that the court should rebuke counsel for making that remark," not being sufficient to preserve an exception to the ruling. Torreyson v. R. R., 366.

19. **Same: Sufficiency of Objection.** An objection to alleged improper remarks of counsel which does not point out the specific statement complained of and does not call the attention of the trial court to the specific grounds upon which it is based is insufficient; and hence an objection in the form, "I except to that statement," made by defendant's counsel at the end of a series of statements by plaintiff's counsel in argument, was insufficient. Ib.

20. **Conclusiveness of Findings of Fact.** The finding of the trial court on conflicting evidence is conclusive on appeal. Investment Co. v. Bernardnon, 384.

21. **Failure to File Brief: Dismissal of Appeal.** Where appellant's time for filing his brief is extended by the court, and he fails to file it within such time, the appeal will be dismissed, under Rule 21 of the St. Louis Court of Appeals. Contracting Co. v. Bank, 428.

22. **Proceedings for Appeal Liberally Construed.** While an affidavit for appeal must substantially comply with the statute, the precedent steps for an appeal should be liberally construed with a view to sustain the appeal. Marshall v. Estate of Shoemaker, 429.

23. **Defective Affidavit for Appeal: Necessity of Objecting Below.** An appeal will not be dismissed because the affidavit for appeal was sworn to before the judgment was rendered, contrary to the procedure contemplated by the statute, where the trial court's attention was not called to the defect. Ib.

24. **Affidavit for Appeal: Time for Making.** The statute requiring an affidavit for appeal (section 2040, Revised Statutes 1909) does not contemplate the making of the affidavit before the judgment appealed from is rendered, and such a course is highly improper and would justify a refusal by the trial court to grant an appeal. Ib.

25. **No Bill of Exceptions: Dismissal of Appeal.** The failure to file a bill of exceptions is not ground for dismissing the appeal, in as much as the record proper would still be before the court for review. Ib.

26. **Same: Review of Record Proper: Executors and Administrators.** On appeal to the circuit court from an order of a probate court, rejecting the vacation appointment of the party appealing, as administrator of an estate, pursuant to section 9, Revised Statutes 1909, and appointing another as such administrator, a judgment of the circuit court, adjudging that said order the probate court be set aside, was sufficient, even in the absence of a bill of exceptions, to warrant consideration by the Court of Appeals of the question as to the right of the adminis-

Digitized by Google

APPELLATE PRACTICE—Continued.

trator, appointed in vacation, to appeal from the order of the probate court, made in term, rejecting the vacation appointment. Ib.

27. **Reviewing Instructions: Necessity of Exception.** An instruction will not be reviewed on appeal, where no exception to the giving of the same was saved. Berkbiegler v. R. R., 441.

28. **Action in Equity: Reviewing Evidence.** While an appellate court is authorized to review the evidence in an equity case, yet in determining the weight to be attached to the testimony of the witnesses, where it is oral and conflicting, deference will be given to the opinion of the trial court, who had the opportunity of seeing the witnesses face to face and observing them while they were testifying. Mining Co. v. Coyne, 492.

29. **Evidence: Preserving Diagram in Record.** Where a witness was examined with a map or diagram of the scene of the accident, but the appellant did not preserve such map or diagram in the record presented to the appellate court and the testimony standing alone is unintelligible, the appellant will not be permitted to draw unfavorable inferences from such testimony. Hegberg, Admr. v. R. R., 514.

30. **Reviewing Record: No Exceptions.** Section 2083, Revised Statutes 1909, has made it the duty of the appellate court, independent of any action of the attorneys, to examine the record and if any error is apparent on the face of the record to reverse the judgment *sua sponti*, whether any exceptions are taken or not. Ib.

31. **Objections to Question: Specific Objection Necessary.** Objections to evidence to be available in the appellate court must be specific and the same rule applies in making objections to hypothetical questions put to an expert. The objection to such question should state why the question is not proper and what essentials are omitted. Ridenour v. Min'g Co., 576.

32. **Assignment of Errors: Briefing Point: Waiving Error.** Where the appellant included in its assignment of errors the giving of an instruction on behalf of respondent but makes no further reference thereto, either in its first brief or reply brief, but in its additional reply brief again raises the point and makes an argument thereon, it will be deemed to have waived the assignment of error and the appellate court will not consider the point. Ib.

33. **Admitting Incompetent Evidence: Objections.** Where appellant contends that certain evidence should not have been admitted by the trial court, it will be confined to objections made at the time of the introduction of such evidence and will not be permitted in the appellate court to offer additional objections. Covell v. Western Union, 630.

34. **Objections to Evidence.** Where the introduction of testimony is objected to on certain grounds, additional objections will not be considered when made for the first time in the appellate court. Schneider v. Johnson, 639.

35. **Supreme Court Decision: Binding Effect.** The Courts of Appeal are bound by the decisions of the Supreme Court. State ex rel. v. Moore, 649.

Digitized by Google

APPELLATE PRACTICE—Continued.

36. **Same: Obiter Dictum.** Where a record properly presents a question, a decision thereon is not *obiter dictum*, though perhaps the decision of some other point determines the affirmation or reversal of the judgment in that case. State ex rel. v. Moore, 649.

37. **Excessive Verdicts: Review.** Appellate courts are slow to interfere with verdicts on the ground that they are alleged to be excessive, for the reason that the judge before whom the case was tried is better qualified than is the appellate court to say whether or not the verdict is excessive. Hopkins v. Springfield, 682.

38. **Briefs: Points and Authorities: Complying with Rule.** An appellant in the Springfield Court of Appeals, should comply with Rule 13, which requires an enumeration in his brief of the points relied on, together with the citation of authorities appropriate under such point, and a failure to comply with such rule carries penalties contained in the rule and in Rule 21. Crider v. Haynes, 728.

39. **Demurrer to Evidence: Motion for New Trial: Saving Exceptions.** Where appellant complained of the action of the trial court in giving a peremptory instruction directing a verdict for the defendant, and his abstract does not show that he saved any exception to such action, neither did it appear that appellant saved any exceptions to the action of the trial court in overruling its motion for a new trial, and the record proper is free from material error, the judgment will be affirmed. Ib.

ARBITRATION. **See Fire Insurance, 7.**

1. **Filing Award: Judgment: Action on Award.** Notwithstanding an arbitration may be had under the provisions of the statute, and notwithstanding the award is not filed with the circuit court in the time required in order that it may be made a judgment of that court, yet it remains a valid arbitration and an independent action may be maintained on the award. Beall v. Board of Trade, 186.

2. **Award: Validity: Gambling: Future Delivery: Intention.** If it be conceded that an arbitration cannot be had on a claim arising out of a gambling transaction such as an option deal, yet where the evidence merely shows a transaction for the purchase of grain to be delivered in the future, without it appearing that there was no intention to deliver or to receive, it is not illegal and a claim thereon may be arbitrated. Ib.

3. **Same: Board of Trade: Members: Controversy: Adjustment.** A and B were members of a board of trade, an unincorporated voluntary association. A corporation of which B was a member became indebted to the corporation of which A was a member. B's corporation was financially embarrassed and offered A's corporation thirty cents on the dollar in full settlement. The latter agreed to accept if B, individually, would agree to pay the balance. B promised to do so and A's corporation then accepted thirty per cent of its claim in full payment. B afterwards denied the agreement. *Held*, that this was a proper controversy for arbitration, and that an award in favor of A's corporation was binding. Ib.

ARRAIGNMENT. **See Crimes and Punishments, 5, 6, 7, 8; Municipal Corporations, 4.**

Digitized by Google

ARREST.

**Police Officers of City of St. Louis: Right to Make Arrest on Suspicion.** Under the charter of the city of St. Louis, police officers are authorized to arrest persons on grounds of reasonable suspicion that they have committed an offense. Kearney v. Laird, 406.

ASSAULT. See **Damages, 4; Railroads, 4, 5, 6.**

**Intent: Pleading: Question for Jury.** In an action for damages for assault, proof that defendant broke into plaintiff's house in the night time and placed his hands on her person while she was asleep, is sufficient to authorize a recovery, and it was not necessary to prove the assault was committed with intent to have carnal intercourse, although the petition so alleged. Lemmons v. Robertson, 85.

ASSIGNMENTS. See **Special Taxbills, 1, 2, 3.**

1. **Accounts: Assignment: Justices' Courts.** Where the plaintiff having authority from the defendant to do so, had ordered an abstract from the abstracter and the latter's account therefor was turned over to the plaintiff and thereafter the plaintiff instituted a suit against the defendant on account of the cost of the abstract, the assignment to the plaintiff of the abstracter's account was *held* legal, although no written assignment thereof was executed until after the case was tried before the justice. Carroll v. Lemmons, 655.

2. **Assignment of Claim: Implied Warranty: Recovery of Purchase Money by Assignee.** As a general rule the assignor of a claim impliedly warrants that it is valid and that the debtor or obligor is liable to pay it and if in fact the claim is invalid, the assignor is liable to the assignee for the amount paid for the assignment. Bank v. Burress, 690.

ASSUMPTION OF RISK. See **Master and Servant, 2.**

ATTACHMENTS. See **Justices' Courts, 3, 4, 5; Landlord and Tenant, 1.**

**Judgment on Plea in Abatement.** An attachment in aid of a civil suit is a mere provisional remedy and an ancillary incident in the cause and the judgment on the issue in abatement is no more than an interlocutory judgment. Stevens v. Earll 461.

ATTORNEY AND CLIENT. See **Witnesses, 5, 6.**

BILLS OF EXCEPTIONS. See **Appellate Practice, 1, 8, 9, 13, 14, 18, 25, 26, 27, 30; Crimes and Punishments, 10.**

**Bystanders' Bill.** The statutes provide that a bill of exceptions shall be signed and in case of the judge's refusal to sign the bill on the ground that it is untrue, he shall so certify thereon the cause for such refusal, and the statute provides how the bill may be signed by bystanders. A bill of exceptions not signed at all is a nullity. State v. Brown, 726.

BILLS AND NOTES. See **Fraud and Deceit, 4, 6, 7, 8; Judgments, 2; New Trial, 2.**



Digitized by Google

BILLS AND NOTES—Continued.

1. **Surety: Consideration: Signing Afterwards.** Where a surety signs a note that has been already executed and delivered and is a past transaction, without any new consideration, it is without consideration as to him. But if at the time the note is given, it is a part of the contract out of which the note arose that the surety will be procured to sign, and he does so, no new consideration is necessary and he is bound. Ford v. McClain, 174.

2. **Fraud: Sufficiency of Evidence.** In an action on a promissory note defendants alleged that the note had been given as the purchase price of a horse, the sale of which had been procured through fraud. The plaintiff claimed to be an innocent purchaser of the note. The evidence is examined and *held* sufficient to establish the fraud. Link v. Jackson, 195.

3. **Same: Innocent Purchaser: Burden of Proof: Instructions.** In an action on a promissory note where the defense is fraud and plaintiff claims to be an innocent purchaser and the evidence is sufficient to establish the fraud, the burden is upon the plaintiff to show that he purchased the note for value before maturity and without notice of the fraud, and an instruction is properly refused, which impliedly places the burden upon the defendant to prove notice of the fraud on the part of the plaintiff at the time he purchased the note. Ib.

4. **Same: Knowledge: Definition: Bills and Notes.** In an action on a promissory note where plaintiff claims to be an innocent purchaser of the note that defendants allege was procured by fraud, an instruction which defined the word "knowledge" was *held* warranted under the facts in this case, but as a general rule the better practice would be not to undertake to define the word "knowledge" in an instruction. Ib.

BOARD OF TRADE. **See Arbitration, 2, 3; Gambling Contracts, 1.**

BROKERS. **See Real Estate Brokers; Loan Agents.**

BURDEN OF PROOF. **See Accord and Satisfaction, 1; Bills and Notes, 3; Contracts, 4; Fire Insurance, 6, 9, 11; Negligence, 1; Notice, 1; Payment, 1; Railroads, 7, 12, 16, 30; Real Estate Brokers; Replevin.**

CARRIERS OF PASSENGERS. **See Negligence, 2; Railroads, 24; Street Railways, 1, 2.**

1. **General Negligence: Inference.** Where a passenger brings an action against a carrier for personal injury alleging negligence in these words: "The defendant carelessly and negligently operated said train in such manner that the train of cars left the track," etc., it was *held* to be a general charge of negligence and that the plaintiff need go no farther than to show the derailment and injury, the law raising an inference of negligence. Moore v. R. R., 34.

2. **Pleading: Specific Negligence: Instructions.** Where the petition, in the case of a passenger against a carrier, pleads specific acts of negligence, it is error to direct a verdict for plaintiff on a finding by the jury that the injury was caused by the negligent failure of the defendant to exercise the highest practicable degree of care for the safety of plaintiff. Gabriel v. Railroad, 56.

Digitized by Google

CERTIORARI. See Dramshops, 2.

CHANGE OF VENUE. See Justices' Courts, 3, 4.

**Statutory Right.** The right to a change of venue only exists by virtue of some statute authorizing it. Stevens v. Earll, 461.

CHATTEL MORTGAGES. See Corporations, 1.

**Corporations: Chattel Mortgage: Defective Acknowledgment: Mortgagee's Possession of Property.** A chattel mortgage of a corporation is invalid as to any person other than the parties thereto, unless possession of the mortgaged property is delivered to the mortgagee, where the acknowledgment of the president of said corporation fails to state that the president signed and sealed the instrument in behalf of said corporation, by authority of its board of trustees or directors, as required by section 2799, Revised Statutes 1909. But the mortgagee's title would be good where he takes possession as purchaser at a foreclosure sale under the mortgage. Mining Co. v. Coyne, 492.

CHILDREN. See Adoption; Infants.

CIRCUIT COURTS. See Jurisdiction, 1; Prohibition, 1.

CITIES. See Municipal Corporations.

COMMERCIAL PAPER. See Bills and Notes.

COMPROMISE. See Accord and Satisfaction, 1, 2, 3.

CONFLICT OF LAWS. See Prohibition, 1.

CONSIDERATION. See Bills and Notes, 1; Sales, 1, 2; Special Taxbills, 1.

CONSTITUTIONAL QUESTION. See Appellate Practice, 14.

CONSTRUCTIVE NOTICE. See Notice.

CONTRACTS. See Fire Insurance, 5; Gambling Contracts; Mechanics' Liens, 1; Pleading, 1.

1. **Breach: Damages.** A person, who commits a breach of a contract and thereby injuries the other party, is not permitted to escape liability because the amount of the damages he caused is uncertain and not susceptible of accurate proof. The jury are invested, in such cases, with the function of fixing the amount from the facts and circumstances shown by proof. Thayer-Moore Brokerage Co. v. Campbell, 8.

2. **Breach of Contract: Measure of Damages.** Plaintiff, a subcontractor, sued to enforce a mechanic's lien for plastering. The work was not done according to the contract. The owner rented the building and did not remove the plaster, or have it done as required by the contract. He was allowed damages to the extent of the reasonable cost of removing the defective work and replacing it with plaster that would conform to the contract. *Held*, that if the owner is willing to continue in

Digitized by Google

CONTRACTS—Continued.

the use of the defective work, that is his privilege, but he should not thereby be compelled to forego the right to reasonable compensation for the breach. Walter v. Huggins, 69.

3. **Pleading: Performance: Acceptance: Evidence.** Where a contract for work in grading is performed under the direction and supervision of the party having the work done, and as directed, and it is accepted by him, this is evidence of performance and not a waiver, and a judgment under such evidence is supported by a petition alleging performance of the contract. Hanenkratt v. Brougham, 108.

4. **Alteration: Burden of Proof.** In an action on a contract where the defendant pleads an alteration, the burden is upon the defendant to show such alteration. Hatch v. Bayless, 216.

5. **Conditions: Necessity of Showing Performance.** When a contract is made upon a certain named condition, a party seeking to recover under such contract must bring himself within such condition. Hughes & Thurman v. Dodd, 454.

6. **Must Yield to Statutory Provisions: Fire Insurance.** Laws in existence at the time of the making of a contract are necessarily referred to in all contracts made under such laws, and no contract can change the law and so in insurance policies the stipulation in the policy must yield to the statute. Sharp v. Ins. Co., 475.

7. **Offer and Acceptance: Accepting in Part: Equity.** Equity will not allow parties to appropriate the part of a transaction that is favorable to them and reject that which is not, thereby assuming the inconsistent position of affirming a contract in part and disaffirming it in part. Mining Co. v. Coyne, 492.

CONTRIBUTORY NEGLIGENCE. See **Negligence.**

CONVERSION. See **Res adjudicata.**

CONVEYANCES. See **Chattel Mortgages; Mortgages and Deeds of Trust; Real Estate, 1.**

CORPORATIONS. See **Chattel Mortgages, 1; Evidence, 7; Judgments, 6; Statute of Frauds.**

1. **Chattel Mortgage: Defective Acknowledgment: Mortgagee's Possession of Property.** A chattel mortgage of a corporation is invalid as to any person other than the parties thereto, unless possession of the mortgaged property is delivered to the mortgagee, where the acknowledgment of the president of said corporation fails to state that the president signed and sealed the instrument in behalf of said corporation, by authority of its board of trustees or directors, as required by section 2799, Revised Statutes 1909. But the mortgagee's title would be good where he takes possession as purchaser at a foreclosure sale under the mortgage. Mining Co. v. Coyne, 492.

2. **Unpaid Stock Subcriptions: Stockholder's Liability to Creditor: Pleading: Sufficiency of Petition.** In an action against a stockholder by a creditor of a corporation to recover from the stockholder his unpaid subscription to the capital stock to satisfy certain debts owed by the corporation to the plaintiff,

Digitized by Google

CORPORATIONS—Continued.

the various counts in the petition are examined and *held* sufficient to state a cause of action after verdict. Schneider v. Johnson, 639.

3. **Same: Stockholder's Liability to Creditor: Judgment Creditor.** In an action by a creditor of a corporation against a stockholder to satisfy the debts owed by the corporation from the amount due the corporation by the stockholder for unpaid stock subscription, it is not necessary that the creditor should be a judgment creditor of the corporation. Ib.

4. **Dissolution: Unpaid Stock Subscription: Stockholder's Liability to Creditor.** A creditor of an insolvent corporation, seeking to satisfy his claims out of an amount due from a stockholder on unpaid subscription to stock, does not have to wait until the corporation's charter has expired or until the corporation has been judicially dissolved, but as to him the corporation will be deemed dissolved when it has ceased to be a going concern and has disposed of its tangible assets and there is no probability of it again carrying on the business for which it was organized. Ib.

5. **Same: Pleading: Harmless Error.** In an action by a creditor of a corporation against a stockholder to satisfy the corporate debts out of the amount due from the stockholder on account of unpaid subscription to corporate stock, the petition did not allege in definite and certain terms that the appellant was a stockholder at the time of the dissolution, but contained the allegation that the defendant was a stockholder and asked judgment against him on the ground that he was a former stockholder. The trial court's attention was not called to the indefiniteness of this allegation. *Held*, that the defect did not justify reversing the judgment. Ib.

6. **Same: Sufficiency of Evidence.** In an action against a stockholder by a creditor of a corporation to recover and have applied on his debts the amount due by the stockholder for unpaid subscription to the capital stock of the corporation, the evidence is examined and *held* sufficient to show that the defendant was indebted to the corporation for unpaid subscription to stock held by him. Ib.

COUNTERCLAIMS.

1. **Nature: Set-off.** A counterclaim must constitute a good cause of action in favor of defendant and against plaintiff, and must be a claim upon which a separate action would lie. If the facts do not constitute such a cause of action, they do not constitute a counterclaim, although they may be sufficient to constitute a set-off. Thayer-Moore Brokerage Co. v. Campbell, 8.

2. **Same: Unliquidated Damages.** To constitute a set-off the demand must be in the nature of a debt, and as an unliquidated claim for damages is not included in the term "debt" it cannot be made the subject of set-off. Ib.

COUNTY COURTS. See **Dramshops, 1, 2, 3, 4; Municipal Corporations, 8.**

Digitized by Google

COURTS. See Circuit Courts; Courts of Appeals; County Courts; Jurisdiction; Justices' Courts; Probate Courts; Prohibition, 1.

COURTS OF APPEALS. See Appellate Practice; Appellate Practice, 35.

CRIMES AND PUNISHMENTS. See Arrest; Indictments and Informations; Intoxicating Liquors; Larceny; Injunctions, 1, 2, 3.

1. **Impeachment of Defendant.** When a defendant in a criminal proceeding offers himself as a witness his credibility may be assailed by proof that he bears the reputation in the community of being guilty of offenses analogous to that for which he is being tried. State v. Chinn, 124.

2. **Information: Indictment: Charge Must be Specific.** It is a settled rule of pleading in a criminal prosecution that the charge against the defendant must be sufficiently specific that the party charged will not be required to go beyond the information or indictment in order to learn the nature of the charge against him or to learn what issues he must meet. State v. Murphy, 204.

3. **Appeal and Error: Affidavit for Appeal: Affidavit by Attorney.** In a criminal case the statute makes no provision for an affidavit for appeal to be filed by an agent or attorney. State v. Birron, 212.

4. **Same.** In a criminal case an appeal will be dismissed where the only affidavit for appeal was made by the defendant's attorney. Ib.

5. **Record: Necessity of Showing Arraignment.** In a criminal prosecution originating in a justice's court and taken to the circuit court by appeal, if the record does not affirmatively show an arraignment or plea by defendant, either before the justice or in the circuit court, the judgment should be arrested. State v. Moss, 379.

6. **Arraignment: Time: Appeal from Justice's Court.** In a criminal prosecution originating in a justice's court and taken to the circuit court by appeal, if there was no arraignment or plea before the justice, either one of these steps must be taken in the circuit court before the jury is sworn and any evidence is heard, since there is no issue to try until that is done. Ib.

7. **Appellate Practice: Failure of Record to Show Arraignment.** The objection to the failure to arraign accused or enter a plea may be first raised in the appellate court. Ib.

8. **Arraignment: Appeal from Justice's Court: Amended Transcript.** Where, in a criminal prosecution, originating in a justice's court and taken to the circuit court by appeal, the record did not show an arraignment of or plea by defendant, either in the justice's or the circuit court, an amended transcript of the justice, showing that formal arraignment was waived and a plea of not guilty entered before the justice, filed by leave while defendant's motion to arrest the judgment for failure of the record to show arraignment was pending, was not sufficient to cure the defect in the record, and hence the trial court erred in overruling the motion in arrest.

Digitized by Google

CRIMES AND PUNISHMENTS—Continued.

*Held*, by NORTONI, J., concurring, that the voluntary amended transcript, filed after verdict, was insufficient to cure the defect, but that an amended transcript of the justice, showing the record and all its entries, could have been filed in the circuit court pursuant to a rule on the justice, under the statute, or to a writ of *certiorari*, and the deficiency in the original transcript thus supplied. Ib.

9. **Indictment: Failure of Proof: Conviction Under Another Section.** Where one is indicted under one section of a statute and the evidence shows he is not guilty of the violation of that section but is guilty of the volation of another section, he may be convicted of a violation under the section which the evidence shows him guilty, provided, the indictment is broad enough to include the offense within its allegations. State v. Sebastian, 469.

10. **Bill of Exceptions: Failure to Sign Bill of Exceptions.** On an appeal in a criminal case it appeared that the bill of exceptions was never signed by the judge of the court in which the case was tried and was wholly unauthenticated in this respect, and no substantial error appearing in the record proper the judgment was affirmed. State v. Brown, 726.

CRIMINAL LAW. See **Crimes and Punishments; Indictments and Informations.**

CRIMINAL PRACTICE. See **Crimes and Punishments; Indictments and Informations.**

DAMAGES. See **Appellate Practice, 37; Contracts, 1, 2; Counterclaims, 2; Death by Wrongful Act, 3, 10, 15; Instructions, 1, 2; New Trial, 8; Witnesses, 4.**

1. **Measure of Damages.** An instruction on the measure of damages which allows a recovery for medical services and medicines without restriction as to amount, is erroneous where the petition fixes such expenses at a definite sum. Such damages are special, must be specially pleaded, and the recovery limited in the instructions to the amount alleged. Smart v. R. R., 61.

2. **Instructions: Measure of Damages: Medical Attendance, Medicines and Nurse Hire.** Where the petition in a personal injury case, claims separate certain amounts for medical attendance, medicines and nurse hire, and asks a total sum of ten thousand dollars damages, it is error to instruct the jury to allow her damages and also for medical attendance, medicines and nurse hire in any sum not exceeding ten thousand dollars, without limiting the amount to that claimed in the petition for medical attendance, medicines and nurse hire. McDonald v. St. Ry., 111.

3. **Personal Injuries: Excessive Verdict: Remittitur.** Where the injuries consisted principally of bruises, some swelling, and sleeplessness for a time, as well as "severe pain," with no broken bones or limbs or other permanent injury, a verdict for $6000 was *held* excessive and ordered reduced to $4000. Ib.

Digitized by Google

DAMAGES—Continued.

4. **Assault: Punitive and Compensatory Damages: Excessive Verdict.** Where an employee of a railroad company made a brutal and unwarranted attack on person who was at the station to purchase a ticket to board a train, a verdict of $500 actual and $2500 punitive damages was not excessive. Hedge v. R. R., 291.

DEATH BY WRONGFUL ACT. See **Landlord and Tenant, 3, 4, 5; Pleading, 4; Railroads, 2, 10, 14, 15, 16, 17, 18, 19, 20.**

1. **Death of Plaintiff: Revivor by Administrator: Pleading.** Plaintiff sued for damages for injuries received when thrown from the rear of a street car by the sudden starting of the car as he was about to alight therefrom at a regular stopping place. The case was partially tried and continued. Thereafter plaintiff died and the cause was revived in the name of the administrator, who filed an amended petition which did not contain any allegation that the death of his intestate did not result from the injury. *Held*, that such an allegation was indispensible to his right to continue the suit. Showen, Admr. v. Street Ry., 41.

2. **Damage Act: Construction.** The statute, Sec. 5438, R. S. 1909, being in derogation of the common law, must be strictly construed and the burden is on the administrator to establish by proof his right to maintain the action. Ib.

3. **Compensatory Damages: Evidence: Parents' Loss of Son.** In an action by an administrator for the wrongful death of his decedent, a single man, who was killed by the cars while employed as a brakeman for defendant, it was *held* competent for the father to testify as to the earnings of the deceased and the amount of money he had furnished his parents during his lifetime and their dependance upon his earnings for support, following the holding of the Supreme Court in Boyd v. Railroad, 139 S. W. 561. Hegberg, Admr. v. R. R., 514.

4. **Statutory Action: Action Based on Particular Statute.** In an action under the damage act for the wrongful death of a party resulting from the negligence of the peculiar character specified in section 5425, Revised Statutes 1909, the aggrieved plaintiff must sue under that section and does not have the option of suing under sections 5426 and 5427. These are purely statutory rights and must rest each upon its own statute. Ib.

5. **Same: Railroads.** If the servants and agents of defendant railroad company killed the deceased under circumstances such as to create a liability under section 5425, Revised Statutes 1909, necessarily defendant is not liable for such killing under any other sections; *contra*, if the servants and agents of the defendant killed the deceased under circumstances making defendant liable under any other section of the statute than 5425, defendant is necessarily not liable under such section. Ib.

6. **Same: Pleading.** In an action under the damage act for the wrongful death of a party, resulting from defendant's negligence, it is not necessary for the pleader to designate under which of the sections his action is brought, nor would such designation, if made, be conclusive as to which section the liability would be based upon. Ib.

Digitized by Google

DEATH BY WRONGFUL ACT—Continued.

7. **Same: Pleading.** In an action by an administrator for the wrongful death of his decedent, a brakeman, alleged to have been caused through defendant's negligence, the plaintiff contended that his petition was drawn under sections 5426 and 5427, Revised Statutes 1909. His evidence was given, the instructions drawn and the trial conducted on that theory. The defendant contended that the suit is prosecuted under section 5425, Revised Statutes 1909, *Held*, that plaintiff's cause of action was in fact for a liability under section 5425 and that the petition stated the necessary consistent facts in such a case as to apprise defendant that plaintiff was prosecuting under section 5425. Ib.

8. **Death from Operating Train: Time of Negligent Act.** The general purpose of section 5425, Revised Statutes 1909, is to allow damages for wrongful death, resulting from the negligent acts of servants or employees engaged in running, conducting or managing public conveyances, controlled mostly by common carriers; it requires that the negligence of defendant's employees must have concurred in point of time with the movement or operation of its cars, but not that the negligence must have occurred in point of time with the infliction of the injuries which caused the death. Ib.

9. **Suit by Administrator: Action Not for Benefit of Estate.** An administrator prosecuting an action under section 5425, Revised Statutes 1909, for the wrongful death of his decedent, cannot sue for the benefit of the estate, there being no such statutory provision, but he sues as the personal representative of the distributees who would be entitled to the decedent's real and personal property under the laws of descent and distribution. Ib.

10. **Compensatory Damages: Rule for Estimating Damages.** In estimating the amount of compensatory damages, if any are allowed under section 5425, Revised Statutes 1909, it would seem proper to apply the rule given by section 5427, that is, that such an amount shall be allowed as the jury may deem fair and just with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue. Ib.

11. **Same.** The beneficiaries provided for by the fourth clause of section 5425 are not generally dependent upon the deceased and it is only in those cases where they have in fact been receiving pecuniary assistance and then only to the extent of a fair and just estimate of their loss that they could recover compensatory damages under said section. Ib.

12. **Same: Distribution of Amount Recovered.** In an action under section 5425, Revised Statutes 1909, for the wrongful death of plaintiff's decedent, the beneficiaries were those provided for by the fourth clause of said section. *Held*, that the amount recovered would go to the father, mother, brothers and sisters of the deceased and their descendants in equal parts, although the father and mother were the only ones who suffered pecuniary loss. Ib.

13. **Action by Administrator: Pleading: Allegation Concerning Children.** In an action under section 5425, Revised Statutes 1909, to recover for the wrongful death of plaintiff's decedent,

Digitized by Google

DEATH BY WRONGFUL ACT—Continued.

an allegation that deceased was single and unmarried would be a sufficient allegation that he left no natural children, but not a sufficient statement from which it would naturally be inferred that he did not leave surviving him an adopted child or children. Hegberg, Admr. v. R. R., 514.

14. **Pleading.** In statutory actions to recover for the wrongful death of a person the party suing must bring himself strictly within the statutory requirements necessary to confer the right and they must appear in his petition, otherwise it shows no cause of action. Ib.

15. **Verdict: Excessive: Death by Wrongful Act.** In an action by an administrator to recover damages for the wrongful death of plaintiff's decedent, COX, J., in a separate opinion concurs in reversing and remanding the cause, but places his concurrence upon the ground that since the measure of damages that went to the jury was compensation alone, the verdict of $7500 was excessive. It appeared that the mother and father of deceased were the only relatives who suffered pecuniary loss from the death. Ib.

DEBT. See **Counterclaim; Debtor and Creditor.**

DEBTOR AND CREDITOR. See **Accord and Satisfaction, 3; Debt; Payment, 1; Tender.**

DEEDS OF TRUST. See **Mortgages and Deeds of Trust.**

DEFINITIONS. See **Estoppel, 1; Pleading, 4.**

DEPOSITIONS. See **Appellate Practice, 7, 8, 9, 11.**

**Objections to Form of Question.** Under section 6413, Revised Statutes 1909, objections to the form of questions asked in a deposition must be made at the time the deposition is taken. Campbell, Admr. v. Hayden, 252.

DIVORCE.

**Fraud and Deceit: New Trial.** Plaintiff obtained a decree for divorce, the defendant not appearing, although she had filed an answer and cross-bill. Within four days and at the same term she filed a motion to set aside the decree on the ground of fraud and deceit practiced on her by plaintiff by which she was prevented from appearing at the trial. Plaintiff filed a plea to the jurisdiction of the court. The court sustained defendant's motion and granted a new trial. *Held*, that defendant's motion was, in effect, one for a new trial and not a petition for review. Smith v. Smith, 53.

DRAMSHOPS. See **Intoxicating Liquors; Municipal Corporations, 6, 8, 9, 10.**

1. **License: Remonstrance: Appointment of Commissioner.** Where an application for a license to keep a dramshop is contested by a remonstrance, it is not improper for the county court, on agreement of the parties, to appoint a competent person to meet with the parties or their attorneys to canvass the names of petitioners and remonstrants, to sift out the names of those agreed to be incompetent signers and those agreed to be qualified. State v. Gilbert, 139.

Digitized by Google

DRAMSHOPS—Continued.

2. **License: County Court: Certiorari: Jurisdiction: Mistakes.** The county court has exclusive jurisdiction in the matter of granting dramshop licenses and so long as its record shows that it did not go beyond its jurisdiction in the procedure for a license and in granting the license, its decision cannot be questioned by writ of *certiorari*. Errors or mistakes in law or fact cannot be questioned or corrected in such procedure. Ib.

3. **License: Renewal: Increasing License.** Section 7266, Revised Statutes 1909, does not provide that the county court shall issue a dramshop license for the second six months upon the payment of the amount collected for the first six months. State ex rel. v. Long, 658.

4. **License: Court May Refuse to Renew.** A county court is not compelled at the expiration of the first six months to renew a dramshop license for another six months, but may refuse to do so for any reason it may have refused to issue it when first applied for. Ib.

EQUITY. See **Accord and Satisfaction, 3; Appellate Practice, 28; Contracts, 7; Injunctions; Jurisdiction, 2; Mechanics' Liens, 5.**

ESTOPPEL. See **Fire Insurance, 1; Levee District, 2.**

1. **Estoppel: Ratification: Difference.** An estoppel is a legal consequence—a right—arising from acts or conduct; while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, i. e., not as yet attended with full legal consequences. Watts v. Levee District, 263.

2. **Pleading: Notice: Telegraph Companies.** Where the telegraph blanks used for sending messages contained the name of C, as president and general manager of defendant, and the local agent of defendant informed plaintiff's attorney that C was the proper person to write to with reference to a claim for failure to deliver a message, *held*, that plaintiff was authorized to mail her notice to C relative to such claim and in compliance with the stipulation printed on the back of said message blank, and in such case where defendant shows that C was not its general manager at the time, it is not necessary for plaintiff to plead estoppel. Covell v. Western Union, 630.

EXCEPTIONS. See **Bills of Exceptions.**

EVIDENCE. See **Appellate Practice, 7, 10, 29; Burden of Proof; Contracts, 3; Depositions, 1; Death by Wrongful Act, 3; Fire Insurance, 5, 12; Injunctions, 4; Mines and Mining, 3; Negligence, 13; Notice, 1, 2, 3; Railroads, 13, 16, 27, 28; Trial Practice, 1, 2; Witnesses.**

1. **Expert: Form of Question.** A hypothetical question proponded to a physician as an expert, under the rulings of the Supreme Court, may ask if certain supposed facts "might, could or would" reduce the result stated. Moore v. R. R., 34.

2. **Expert: Rental Value.** A farmer residing in the vicinity of a tract of land and acquainted with rental values is competent to state the rental value of such tract. Such interrogation

Digitized by Google

does not involve or embrace what is known as a hypothetical question propounded to experts. Jenkins v. Womach, 38.

3. **Res Adjudicata: Lease: Former Appeal.** Though an appellate court may decide that a certain alleged verbal contract, as testified to by the plaintiff, was a valid lease, yet on a retrial the question whether such verbal contract was, in fact, made, is open for testimony on both sides of the issue, and it is error to refuse to let defendant testify in denial, on the ground that it is *res adjudicata* by the former appeal. Ib.

4. **Death of Witness: Stenographer's Notes.** Where the party against whom is offered evidence of the testimony given by a witness at a former trial, had the opportunity of confrontation and cross-examination, the evidence is competent, first, in instances where the witness is dead; second, where he is insane or mentally incapacitated; third, where he is beyond seas; and fourth, where he has been kept away by the connivance of the opposite party. Showen, Admr. v. Street Ry., 41.

5. **Expert Testimony: Opinion of Physician.** It being within the province of a physician to testify to the condition, the objective symptoms, of a deceased person when he attended him, it was competent for the physician to testify, after stating that decedent's conversation, by reason of his malady, was generally confined to "Yes" or "No," that his condition was one "in which the mind was not impaired but the way of expressing was the impairment." Campbell, Admr. v. Hayden, 252.

6. **Declarations of Deceased Person.** In an action by an administrator for money turned over by decedent to defendants, the issue being whether he had given it to them absolutely or under a contract whereby they were to take care of him, or whether they were merely to take care of it for him, defendants were entitled to introduce the testimony of decedent's nurse as to what he said to her about giving his property to them. Ib.

7. **Corporations: Admissibility of Parol Evidence to Prove Corporate Acts: Levee Districts.** Parol evidence of corporate acts is admissible, as in the case of natural persons, and while the records are generally conclusive of what actually took place, this is not so when the record is incomplete on its face or when fraud, or the like, appears; and hence, where the minutes of a meeting of the landowners of a levee district contained an entry that one of the directors explained the object and purpose of the meeting, but did not set forth what he stated, parol evidence was admissible to show the nature of the explanation. Watts v. Levee District, 263.

8. **Action for Personal Injuries: Expert Testimony: Physicians: Invading Jury's Province.** In an action for personal injuries, testimony by a physician that plaintiff was suffering from "traumatic neuritis" and that she was suffering from a nervous condition due to a bodily injury such condition being usually termed a "traumatic neurosis," was not incompetent as invading the province of the jury, since it was merely a statement of the nature and character of her ailment, and did not suggest the particular cause thereof. Torreyson v. Rys., 366.

Digitized by Google

EVIDENCE—Continued.

9. **Same: Physical Ability of Plaintiff: Trial Practice: General Objections.** In an action for personal injuries, evidence that plaintiff, before being injured, kept house for her father and was the main dependance and that she was a faithful daughter and stayed with and kept house for her father, mother and aunt, had some bearing on the question of plaintiff's physical ability prior to the injury, and was admissible as against a general objection for immateriality. Ib.

10. **Carbon Copy.** A carbon copy of a document, made at the same time as and by the impressions that produced the original, is competent evidence in any case in which the original would be competent. Leschen v. Brazelle, 415.

11. **Presumptions: Failure to Call Witness.** No presumption should be indulged from the fact that an employer, sued for personal injuries, fails to call as a witness an employee who was connected with the accident, where it is not shown that he is alive, is still in defendant's employ, or is within the jurisdiction of the court. Bush v. Railroad, 420.

12. **Evidence: Expert Testimony: Operating Machinery.** The usual and ordinary way of constructing and operating machinery structures and appliances is a proper subject for expert evidence. Ridenour v. Mines Co., 576.

13. **Hypothetical Questions.** The facts which a hypothetical question must cover should be governed largely by the subject-matter of each particular investigation and must be within the confines of the evidence and to a large extent is subject to the sound discretion of the trial judge. Ib.

14. **Book Entries: Party Furnishing Items Should Testify.** Where a clerk makes entries from items furnished by another, but has no knowledge of their correctness and where such entries are made by a bookkeeper from reports made by a foreman, it is *held* essential that in addition to the oath of a party making the entries the party furnishing the items should testify as to their correctness. Ib.

15. **Incompetent Evidence: Probative Value.** Although the evidence admitted is hearsay and incompetent, yet where it is admitted without objection, its weight is for the jury. Covell v. Western Union, 630.

16. **Mailing Addressed Letter: Presumption.** The fact that a letter was duly stamped and addressed, is evidence that it was received by the addressee. Ib.

17. **Same: Street Address: Presumption.** Although, ordinarily, when a letter is sent to a person in a large city, in order to raise the presumption that the letter was received, by showing that it was sent, duly addressed and stamped, it should also be shown that the address contained the street and number where the addressee resided, yet where the location of the person or firm addressed is well known in the city, as would be the Western Union Telegraph Company, it is not essential to prove that the letter contained the street and number of the addressee. Ib.

Digitized by Google

EVIDENCE—Continued.

18. **Photographs.** Although photographs were taken more than a year after the accident, they are admissible in evidence where a witness testifies that there was relatively no change in the surroundings between the date of the accident and the time the photographs were taken. Davidson v. R. R., 701.

19. **Same: Physical Facts.** Photographs as evidence stand on the same footing as diagrams, maps or models, and rest to some extent on the credit of the witness, and they are not unimpeachable evidence, nor do they stand on the same basis as physical facts. The weight to be given them is to be determined under the same tests as are applied to other evidence. Ib.

20. **Physical Facts: Conflicting with Witness' Testimony.** The law as to the weight to be given to physical facts is fully recognized in this state, to the effect that where the established physical facts and common observation and experience conflict with the testimony of a witness, such testimony must yield and the statement of the witness does not amount to substantial evidence of the facts testified to and cannot be accepted as the basis of a verdict or judgment. Ib.

EXECUTION SALES. See **Judgments, 6.**

EXECUTORS AND ADMINISTRATORS. See **Appellate Practice, 26; Death by Wrongful Act, 1, 2, 3, 9, 13; Evidence, 6; Instructions, 5; Payment, 1.**

1. **Gifts: Action for Money Had and Received: Sufficiency of Evidence.** Evidence, in an action by an administrator for money turned over by decedent to defendants, *held*, while authorizing a finding to the contrary, to authorize an inference by the jury, that such turning over was not intended by decedent nor treated by defendants as absolute, either under a contract for care of decedent by defendants, or as a gift *inter vivos*. Campbell, Admr. v. Hayden, 252.

2. **Refusal to Appoint Applicant: Probate Courts: Appealable Orders.** The right of appeal in probate matters is determined solely by section 289, Revised Statutes 1909; and, under it, an appeal does not lie from an order refusing to appoint one administrator of an estate in the first instance. Marshall v. Estate of Shoemaker, 429.

3. **Vacation Appointment: Tenure of Office.** The term of one appointed administrator of an estate in vacation of the probate court, pursuant to section 9, Revised Statutes 1909, extends only to the convening of the court in term and until the court either confirms or rejects the appointment. Ib.

4. **Same: Refusal to Confirm: Probate Courts: Appealable Orders.** Section 9, Revised Statutes 1909, provides that the probate court, or the clerk or judge thereof in vacation "subject to the confirmation or rejection of the court," shall grant letters of administration. Subdivision 9 of section 289, Revised Statutes 1909, gives a right of appeal from all orders revoking letters of administration, and subdivision 15 provides that the right of appeal therein given shall extend to any heir, creditor or other person having an interest in the estate being administered. *Held*, that an administrator appointed in vacation

Digitized by Google

EXECUTORS AND ADMINISTRATORS—Continued.

had no right, under the statutes, to appeal from an order of the probate court, made in term, rejecting the vacation appointment; there being no "revocation" of letters of administration, within subdivision 9, and the vacation appointment not having vested the appointee with an interest authorizing an appeal under subdivision 15. Ib.

EXHIBITS. See **Pleading, 7.**

FENCES. See **Railroads, 11, 12, 13.**

FIRE INSURANCE. See **Contracts, 6.**

1. **Three-fourths Valuation: Valued Policy: Estoppel:** Under the statute, Sec. 7030, R. S. 1909, an insurance company is directed not to issue a policy of fire insurance for more than three-fourths of the value of the property; but when such value is fixed and the policy issued the company is estopped from asserting that the policy was for more than three-fourths of the value at the date of the insurance (Gibson v. Ins. Co., 82 Mo. App. 515; distinguishing Surface v. Ins. Co., 157 Mo. App. 570); and recovery may be had for the face of the policy less depreciation since date of insurance. Spickard v. Fire Assn., 1.

2. **Same: Depreciation: Sales: Salvage.** But the fact that the policy is thus practically a valued policy will not prevent the amount of liability being reduced by depreciation, sales, decay or salvage. Ib.

3. **Books: Inventory: Forfeiture.** When a policy of fire insurance on personal property provides for keeping of books and inventories and the insurer does not demand their production after the fire, no forfeiture can be had for want of compliance with the policy. Ib.

4. **Vacancy Permit: Waiver.** Plaintiff sued on a policy of fire insurance for loss sustained by fire to his farm dwelling. At the time of the fire the house was vacant. The plaintiff, some time prior to the fire, upon hearing that the house was vacant, wrote to the insurance company's agent to issue a vacancy permit, but none was issued. The policy contained a provision that if the premises should become vacant, without the consent of the company's agent, the policy should be void. *Held*, that on receipt of the notice the company was bound to act with reasonable despatch and either issue the requested permit or cancel the policy and return the premium. Patterson v. Ins. Co., 157.

5. **Evidence: Forfeiture.** It is error to admit evidence of an oral agrement that a future breach of an insurance contract by the insured will be condoned and not allowed to terminate the policy, as such agreement will not constitute a waiver of a future breach. Ib.

6. **Personal Property: Depreciation in Value: Burden of Proof.** In an action on a fire insurance policy it appeared that the trial court tried the case on the theory that the property insured was real estate and declared by instructions given that it devolved upon defendant to show a depreciation in the value of the property if, any, at the time of the loss. This was *held*

Digitized by Google

error for the reason that under the evidence it appeared that the property insured was personal property and in such case it devolved upon the plaintiff to show the actual cash value of the property insured at the time of the fire, and his consequent loss by reason of its destruction. Sharp v. Ins. Co., 475.

7. **Arbitration: Failure of Appraisers to Agree: Action on Policy.** In an action on a fire insurance policy a provision of the policy required that in the event of disagreement as to the amount of loss, the same should be ascertained by two appraisers, the insured and the company each selecting one and the two so chosen to select an umpire; but it appeared that the two appraisers after being selected were unable to agree upon an umpire and the evidence supported the conclusion of the trial court that such failure to agree upon an umpire was not due to the misconduct of plaintiff or his appraisers. *Held*, that the commencement of this suit after the abandonment of the effort to arbitrate the loss was not premature. Ib.

8. **Pleading: Valued Policy Law: Real Property.** In an action to recover insurance for damages caused by fire, since the adoption of section 7020, Revised Statutes 1909, which is called the valued policy law, the petition in cases where real property is insured need not state the value of the property; the policy fixes the value. Ib.

9. **Real Property: Total Loss: Burden of Proof.** Under sections 7020 and 7021, Revised Statutes 1909, the mode of estimating the depreciation and the burden of proving the depreciation is confined exclusively to total loss in cases of insurance of real estate. Ib.

10. **Valued Policy Law: Three-fourths Clause: Real Property; Personal Property.** Section 7030, Revised Statutes 1909, which provides that no company shall take any risk on any property in this state at a ratio greater than three-fourths of the value of the property insured and when taken its value shall not be questioned in any proceeding, has been *held* to be a general provision applying to both real and personal property. Ib.

11. **Same: Personal Property: Burden of Proof.** Under the insurance laws of this state a fire insurance policy on chattels is valued only to the extent of precluding the company from denying that value at the time the policy was written, but the burden is upon the plaintiff to show the value of the property insured at the time of the fire. Ib.

12. **Same: Evidence of Value: Harmless Error.** In an action on a fire insurance policy covering ice plant machinery, where the plant has been running five years before the policy was issued and the fire took place fifty-one days after the policy was issued it was *held* not prejudicial error for the trial court to refuse to allow a witness to testify concerning the purchase price of the machinery at the time it was installed, five years previous thereto. Ib.

13. **Same: Value of Property: Evidence.** In an action on a fire insurance policy covering ice plant machinery it is *held* that the cash value of plaintiff's property at the time it was destroyed by fire was in issue and that the trial court should have admitted in evidence the testimony of defendant's witnesses,

Digitized by Google

FIRE INSURANCE—Continued.

tending to show the value at the time of the destruction of the property by fire. Ib.

14. **Same: Personal Property: Value of Property After Fire.** The legal definition of what constitutes a total loss as these words are used in the statute concerning valued policies has no application to cases of insurance of personal property and the adjustment of losses thereunder, and if any of the personal property insured after the fire is suitable for any purpose and by reason thereof has a market value, such value should be taken into consideration in ascertaining plaintiff's actual loss. Ib.

15. **Pleading: Personal Property.** In an action on a fire insurance policy covering personal property, the petition should state the value of the property at the time of the fire, what pecuniary interest the plaintiff had in it and that the loss was due and payable. Ib.

16. **Fixtures: Trade Fixtures: Fire Insurance.** In an action on a fire insurance policy to recover for the destruction of ice plant machinery which was being operated in a building located on a railroad right of way, a portion of which right of way had been leased to the plaintiff, the evidence is examined and *held* not to show that the machinery or buildings were so incorporated with the freehold as to become a permanent part thereof and that, as between landlord and tenant, the reasonable conclusion is that they remained personal property. Ib.

FIXTURES. See **Landlord and Tenant, 6.**

1. **Real Estate: Fixtures.** It is an elementary principle of the common law that land includes houses and buildings thereon and that whatever is affixed to the soil is thereby made a part of it and passes by grant of the land without other designation. Sharp v. Ins. Co., 475.

2. ———: ———: **Trade Fixtures: Landlord and Tenant: Personal Property.** As between landlord and tenant annexations made by the tenant to the real estate in aid of his trade are on the grounds of public policy removable by the tenant because they are not presumed to have been annexed with the intention of making them permanent additions to the realty and they continue to be personal property. Ib.

3. ———: ———: ———: ———: ———: **Fire Insurance.** In an action on a fire insurance policy to recover for the destruction of ice plant machinery which was being operated in a building located on a railroad right of way, a portion of which right of way had been leased to the plaintiff, the evidence is examined and *held* not to show that the machinery or building were so incorporated with the freehold as to become a permanent part thereof and that as between the landlord and tenant the reasonable conclusion is that they remained personal property. Ib.

FOREIGN JUDGMENTS. See **Judgments, 1, 2, 3, 4, 5.**

FORFEITURE. See **Fire Insurance, 3.**



Digitized by Google

FRATERNAL BENEFICIARY ASSOCIATIONS.

**Right to Restrict Beneficiaries to Certain Classes: Statute.** Section 7109, Revised Statutes 1909, which provides that, "Payments of death benefits shall be to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent upon, the member," does not require fraternal beneficiary associations to change the beneficiary in a policy, at the instance of insured, to a person embraced within one of the specified classes but who is forbidden to be a beneficiary under the by-laws of the association; and such associations may provide by their by-laws that beneficiaries shall be confined to persons belonging to any one or more of the classes specified by the statute and that persons belonging to any of the others of such classes shall be excluded. State ex rel. v. Knights Father Matthew, 361.

FRAUD AND DECEIT. See **Bills and Notes, 2, 3, 4; Divorce, 1; Justices' Courts, 1; Mortgages and Deeds of Trust, 1, 2; Pleading, 1; Special Taxbills, 3.**

1. **Pleading: Justices' Courts.** Plaintiff sued in a justice court for damages sustained by reason of the misrepresentations of defendant as to the age and condition of a cow bought from defendant. The statement filed in the justice court is *held* to be sufficient especially as to an attack made for the first time after verdict. Stratton v. Dudding, 22.

2. **Instructions: Actual Knowledge.** In an action for fraud and deceit an instruction, which directed the jury to return a verdict for defendant unless they believed from the evidence that defendant had *actual knowledge* of the falsity of his representations, is erroneous. Ib.

3. **Pleading: Proof: Instructions.** A party basing an action or defense upon fraud cannot plead it in general terms, but must allege the facts upon which he relies as constituting fraud. He must then prove his case as he has pleaded it and the instructions should follow the proof. Link v. Jackson, 195.

4. **Instructions: Fraud: Failure to Define: Self-Invited Error.** An instruction is assailed on the ground that the word "fraud" is not defined, but the error is *held* harmless because the evidence of fraud was not contradicted and if believed by the jury is so conclusive that it is apparent that the jury could not have been misled by the instructions. *Held, further*, that the instructions asked and given on the part of the appellant were open to the same objection and that he therefore cannot complain. Ib.

5. **Belief: Knowledge.** If fraud exists and a party has such knowledge of it as to cause him to believe that it exists and he acts upon that belief, the result is the same as if he had actual knowledge of the fraud and acted upon that. Ib.

6. **Suspicion: Bills and Notes.** Where the defense in an action on a promissory note is that the note was procured by fraud but plaintiff claims to be an innocent purchaser, *held*, that if the note was procured by fraud then knowledge of facts bearing on that question which go no farther than to arouse suspicion are not sufficient. But when the impression made upon the mind by the knowledge of facts relating to such fraud passes from the realm of suspicion and grows to belief, it then becomes knowledge. Ib.

Digitized by Google

FRAUD AND DECEIT—Continued.

7. **Knowledge.** Knowledge of fraud to bind a party is knowledge of such facts, as would cause a reasonably prudent man to believe in the existence of the fraud. Ib.

8. **Same.** Where a party actually believes in the existence of fraud at the time he purchases the note, then it is immaterial how meager the facts may be which induce that belief. Ib.

FRAUDS, STATUTE OF. See **Statute of Frauds.**

GAMBLING CONTRACTS. See **Arbitration, 2, 3; Injunctions, 3.**

**Speculation: Intention.** It is not all purchases on future deliveries, even though for speculation and the commodity is not on hand at the time, that the law condemns. There must be no intention to deliver. Beall v. Board of Trade, 186.

GIFTS. See **Executors and Administrators, 1.**

GUARANTOR. See **Usury, 2.**

HIGHWAYS. See **Streets.**

HORSE RACES. See **Injunctions, 3.**

IGNORANCE OF LAW. See **Sales, 2.**

INDICTMENTS AND INFORMATIONS. See **Crimes and Punishments, 2, 9; Intoxicating Liquors, 1, 2, 3.**

**Charge Must be Specific.** It is a settled rule of pleading in a criminal prosecution that the charge against the defendant must be sufficiently specific that the party charged will not be required to go beyond the information or indictment in order to learn the nature of the charge against him or to learn what issues he must meet. State v. Murphy, 204.

INDORSER. See **Usury, 2.**

INFANTS. See **Adoption; Negligence, 10, 11.**

INJUNCTIONS.

1. **Officers: Controlling Discretionary Acts.** Where the law casts both a right and a duty upon an officer, involving the exercise of discretion, his conduct with respect thereto is no more to be controlled by injunction than by mandamus. Kearney v. Laird, 406.

2. **Municipal Corporations: Police Officers: Controlling Discretionary Acts.** Public policy forbids the courts to hamper or thwart, by injunctive process, the power and discretion of the police in their performance of the duties cast upon them pertaining to the public weal. Ib.

3. **Same: Interference with Business: Wagering on Horse Races.** Plaintiff and his clerk, who had previously been bookmakers on a race track, opened a cigar store in the city of St. Louis, to which persons who had followed and patronized horse races resorted for the the purpose of placing wagers on horse races, for a commission, at an office maintained by plaintiff for that purpose in a city in another state. After depositing the amount

Digitized by Google

INJUNCTIONS—Continued.

of the wager with the clerk, the customers, acting for themselves, telephoned the wager to plaintiff's office in such other city, by means of a telephone in plaintiff's cigar store. The clerk and these customers had been arrested by the police on several occasions, on suspicion that they were laying wagers on horse races through plaintiff, but none of them were convicted. In an action by plaintiff to enjoin the police from interfering with his business by making these arrests on suspicion, *held*, that plaintiff conducted his store in defiance of sections 4748 and 4749, Revised Statutes 1909, denouncing as a felony the occupying of a building for receiving or recording wagers on horse races and the maintaining of a telephone therein for the purpose of communicating information to any place in this or another state for the purpose of there recording wagers on horse races, etc., and that reasonable grounds of suspicion existed that the customers arrested were aiding and abetting plaintiff in violating the law, authorizing the police to arrest them, under the Charter of St. Louis; and hence it is *held* that plaintiff was not entitled to injunctive relief. Kearney v. Laird, 406.

4. **Removing Cloud From Title: Mechanics' Liens: Setting Aside Judgment.** In action to set aside a mechanic's lien judgment and to enjoin a sale of property thereunder, where the facts showing the invalidity of the lien were outside of the record and rested in parol and could only be shown by extrinsic evidence, equity will exercise jurisdiction to protect the real property and remove the cloud from the title resulting from such judgment. Mining Co. v. Coyne, 492.

INSTRUCTIONS. **See Appellate Practice, 27; Assault; Bills and Notes, 3, 4; Carriers of Passengers, 2; Damages, 1, 2; Fraud and Deceit, 2, 3, 4; Negligence, 1, 2; Payment, 1; Railroads, 4, 19, 20, 28, 29, 32; Street Railways, 2.**

1. **Assumption of Disputed Facts.** In an action for personal injuries, the court charged that, if the jury found for plaintiff, they should consider such reasonable sums, if any, as plaintiff necessarily paid out for medical treatment and hospital charges, on account of her injuries; the bodily pain and suffering, and mental anguish endured by her resulting from the injuries received; the character and extent of her injuries, and whether they were permanent; the extent, if any, which she had been prevented by reason of such injuries from working and earning a livelihood; and if her injuries were reasonably certain to cause her pain and anguish in the future and to impair or lessen her ability to work or labor, such facts should be taken into consideration also; and if they found for her, they should find in such sum as in their judgment, under all the evidence, would reasonably compensate her for the injuries received, not to exceed the sum named in the petition, etc. *Held*, not erroneous as assuming either that plaintiff was injured or that she had endured bodily pain and suffering and mental anguish. Torreyson v. Rys., 366.

2. **Same.** Where, in an action for personal injuries, there was evidence tending to show that plaintiff was bruised and injured to such an extent that she must have endured some bodily pain and mental anguish, and an instruction submitting the question of liability made the return of a verdict for plaintiff conditional upon a finding that she had been bruised and injured,

Digitized by Google

INSTRUCTIONS—Continued.

it was not error for the court to assume, in the instruction on the measure of damages, that plaintiff had suffered bodily pain and mental anguish. Ib.

3. **Must be Intelligible.** It is important that instructions to the jury should be intelligible and couched in plain and unequivocal language so as to be readily understood by them. Hegberg, Admr. v. R. R., 514.

4. **Comments on Evidence.** It is not the province of the trial court to charge the jury in respect to matters of fact, nor to select out certain facts and tell the jury what weight shall be given them. Cole v. Waters, 567.

5. **Same: Administration.** An instruction offered by defendant in an action on an account against the estate of a deceased person for taking care of and boarding the deceased is *held* erroneous as being a commentary on the evidence and that the court committed no error in refusing it. Ib.

INSURANCE. See **Fire Insurance; Fraternal Beneficiary Associations.**

INTEREST. See **Usury, 1, 3.**

INTOXICATING LIQUORS. See **Dramshops.**

1. **Misbranding Non-Alcoholic Drinks: Information.** The information charging defendant with having in his possession with intent to sell certain non-alcoholic drinks, which were misbranded, is examined and *held* defective in failing to properly charge defendant with using the names of the manufacturers other than himself and in further using the word "manufactures" instead of "manufacturers." State v. Murphy, 204.

2. **Same: Information: Naming Manufacturers.** The information charging an offense under the statute prohibiting the misbranding of non-alcoholic drinks, where it is alleged that defendant had used bottles bearing the name of manufacturers other than himself, should name the other manufacturers whose names the defendant is charged with using, in order that he may know of what his alleged offense consists. Ib.

3. **Selling Liquor to Minor: Indictment: Surplusage: Allegations.** An indictment charged that the defendant "then and there being being a wine grower" unlawfully sold intoxicating wine to a minor, "said wine being of his own production." There was a total failure of proof as to the allegation that defendant was a wine grower and that the wine was of his own production. *Held*, that by omitting the clauses that defendant was a wine grower and the wine was of his own production, the indictment was broad enough to charge an offense under section 4733, Revised Statutes 1909, making it a misdemeanor to sell liquor to a minor without the written permission of the parents. State v. Sebastian, 469.

JUDICIAL SALES. See **Judgments, 6.**

JUDGMENTS. See **Attachments: Mechanics' Liens, 4, 9; Res Adjudicata.**

Digitized by Google

JUDGMENTS—Continued.

1. **Judgment by Confession: Foreign State: Debt: Evidence: Prothonotary.** A prothonotary in the state of Pennsylvania has no authority to confess judgment for a debtor in a written instrument unless the debt can be ascertained from the face of the paper itself. And if it requires evidence to ascertain what the sum claimed to be due is, the prothonotary cannot enter a confession of judgment under the law of that state Educational Society v. La Rue, 93.

2. **Same: Written Paper: Conditions: Contingencies.** Where a note was given payable only on several conditions and contingencies therein set out, and there is nothing to show that these have transpired, the prothonotary in Pennsylvania has no authority to enter a confession of judgment thereon. Ib.

3. **Same: Personal Service: Authority of Prothonotary.** Where a confession of judgment has been entered by the prothonotary and there has been no personal service, the authority of the person confessing the judgment may be questioned in an action on the judgment in another state. Ib.

4. **Same: Prothonotary: Judicial Power: Face of Paper: Action.** In confessing and entering judgment in the state of Pennsylvania, the prothonotary only acts as clerk of the court; he has no judicial powers and cannot hear evidence of the debt, but must look to the terms of the instrument authorizing the confession, and if it does not disclose a proper state of facts, no confession can be made which will bind the defendant in an action on the judgment in this state. Ib.

5. **Same: Judicial Proceedings: Clerk: Judicial Power.** Though a foreign judgment should be considered as valid in the state where rendered, yet if it is not the result of judicial proceedings, but is entered by the clerk as by the confession of the debtor, it is not conclusive against the debtor where asserted by an action thereon in another state. The debtor cannot confer judicial power upon the clerk of a court so as to enable him to perform the functions of the court. Ib.

6. **Sale Under Execution: Judgment Not Satisfied: Corporations.** Where the plaintiff obtained a judgment against a corporation and caused an execution to be levied on its property and at the sale thereunder bid a sum sufficient to pay his judgment and costs, but the property at the time of the sale was covered by a mortgage owned by a stockholder, who at the time was indebted to the corporation for unpaid subscription to stock and who subsequently took the property under the mortgage, and plaintiff realized nothing on his judgment, *held*, in an action by plaintiff against the stockholder to recover the amount of the indebtedness evidenced by the judgment, that the sale under the execution did not satisfy the judgment against the corporation. Schneider v. Johnson, 639.

JURISDICTION. See **Judgments, 1, 2, 3, 4, 5; Mechanics' Liens, 3, 4.**

1. **Actions: Local or Transitory.** A deed to a railroad company organized under the laws of Illinois, conveying land in Granite City, Illinois, to be used for railroad purposes, contained a covenant, which was to run with the land, imposing on the grantee the duty of switching cars between any industries lo-

Digitized by Google

JURISDICTION—Continued.

cated on its line in Granite City, for a specified sum, the benefits of such covenant to inure to all industries then located or which might thereafter be located on said line. *Held*, that, as between an owner of an industry on said line in Granite City and the railroad company, there was privity of contract but not of estate, and an action by such owner to enforce the covenant in regard to switching cars was not a suit *in rem* or *quasi in rem*, involving title to land, but was, in effect, a suit for specific performances of a contract for personal services, and hence a circuit court in Missouri, having jurisdiction of the parties, had jurisdiction of the subject-matter of the action. State ex rel. v. Homer, 334.

2. **Equity: Suits Affecting Land in Foreign Jurisdiction.** Courts of equity have the right to operate on persons within their jurisdiction, even though the acts or contracts involved relate to lands situated outside of their jurisdiction. Ib.

JURY.

1. **Waiver: Sufficiency of Record Entry.** A record entry recited that "this cause coming on to be heard, comes now the plaintiff by its attorney, . . . and the garnishee . . . by his attorney, and this cause is now taken up and submitted to the court," and also recited the overruling of a motion by the garnishee to "set aside the submission of this cause to the court and submit the same to a jury," on the ground that the cause "has already been submitted and said motion is filed out of time." *Held*, that, under section 1970, Revised Statutes 1909, providing that a waiver of a jury trial may be by oral consent entered on the minutes, said entry showed such waiver by the garnishee. Milling Co. v. Bloom, 358.

2. **Waiver: Withdrawal of Waiver.** It is not error to refuse to permit a party to withdraw his waiver of a jury and submit the case to a jury, after substantial progress has been made in the trial of the case before the court. Ib.

JUSTICES' COURTS. See **Assignments, 1; Crimes and Punishments, 5, 6, 8; Fraud and Deceit, 1; Mechanics' Liens, 3, 4.**

1. **Statement: Sufficiency.** The rule that a mere charge of fraud in a petition without specification of the acts which constitute the alleged fraud does not state a good cause of action, does not apply to justice courts where technical accuracy is not required and where a statement is deemed sufficient if it advises the defendant of the nature and amount of the demand with sufficient definiteness to bar another action for the same cause. Stratton v. Dudding, 22.

2. **Appeal: Failure to Give Bond.** Plaintiff obtained judgment in a justice court. Defendant filed an affidavit for appeal, but no bond. The appeal was allowed and plaintiff filed a motion to dismiss in the circuit court which was sustained, defendant claiming that it was excused from giving a bond because its property was in the hands of receivers. *Held*, that the law recognizes no excuse and the motion was properly sustained. George v. Street Ry., 121.

3. **Attachment: Change of Venue.** When plaintiff sues on an action before a justice of the peace and in aid of his action

Digitized by Google

JUSTICES' COURTS—Continued.

procures an attachment and such attachment is resisted by a plea in abatement and the issues presented by such plea are tried by a jury, and the cause then set for trial on the merits at a subsequent date, the plaintiff is entitled to a change of venue from such justice upon filing an affidavit setting up a reason authorized by the statute, provided the same is filed before a jury is sworn to try the cause on the merits. Stevens v. Earll, 461.

4. **Same: Appeal.** An appeal by defendant from a judgment against him on the merits rendered by the justice having jurisdiction of the cause on a change of venue, taken after a judgment has been rendered on the plea in abatement, would carry the whole case to the circuit court for retrial. Ib.

5. **Same.** The law governing attachments in courts of record applies to judgments before a justice of the peace. Ib.

LANDLORD AND TENANT.

1. **Attachment: Action for Rent of House: Tender.** In an attachment suit by the landlord against a tenant for rent due on a house in a town or city, it is a sufficient defense to show that all the rent was tendered before the suit was brought and that the tender was kept good by deposit after suit. Humphreys Mercantile Co. v. Walker, 208.

2. **Liens: No Lien for House Rent.** The landlord has no lien for rent on a house in a town or city. The statute, section 7888, Revised Statutes 1909, confines the lien for rent to crops grown upon agricultural land. Ib.

3. **Injury Suffered on Demised Property: Liability of Landlord.** Where portions of a building are let to several tenants, with part in common for the use of all, the landlord is bound to exercise ordinary care to keep such part in a reasonably safe condition, and for the breach of such duty, causing the death of a child of a person boarding and lodging with one of the tenants, the landlord is liable. Karp v. Barton, 389.

4. **Same: Notice of Defects: Sufficiency of Evidence.** In an action against a landlord for the death of the child of a person who boarded and lodged with one of the tenants, caused by a defect in a porch used by all the tenants, evidence that the landlord's agent who had charge of repairs had been notified of the defect and that the defect had existed for two months before the accident, warranted a finding that the landlord had constructive notice of it. Ib.

5. **Same: Liability to Tenant's Visitors and Lodgers.** The obligation of a landlord extends the same to those visiting or calling upon members of the tenant's family, as it does to the tenant himself; and so a child of one who boarded and lodged with a tenant had a right to be upon a porch of an upper story of the building, which was used in common by all the tenants and the parent could recover from the landlord for the death of the child owing to a defect in the porch which the landlord had negligently failed to repair. Ib.

6. **Fixtures: Purchase by Landlord: Real Property.** Although as between the landlord and the tenant the improvements erected by the tenant on the real estate may be personal property, yet

Digitized by Google

LANDLORD AND TENANT—Continued.

where the landlord purchases such improvements they become by operation of law a part of the freehold and would follow its ownership as fully as if they had been constructed by the landlord in the first instance. Mining Co. v. Coyne, 492.

7. **Same: Trade Fixtures: Landlord and Tenant.** As between landlord and tenant, annexations made by the tenant to the real estate in aid of his trade are, on the grounds of public policy, removable by the tenant, because they are not presumed to have been annexed with the intention of making them permanent additions to the realty, and they continue to be personal property. Sharp v. Insurance Co., 475.

8. **Fixtures: Trade Fixtures: Fire Insurance.** In an action on a fire insurance policy to recover for the destruction of ice plant machinery which was being operated in a building located on a railroad right of way, a portion of which right of way had been leased to the plaintiff, the evidence is examined and *held* not to show that the machinery or buildings were so incorporated with the freehold as to become a permanent part thereof and that, as between landlord and tenant, the reasonable conclusion is that they remained personal property. Ib.

LARCENY.

1. **Larceny: Killing Turkeys: Malicious Mischief.** Defendants were prosecuted for larceny the information charging that "they unlawfully, willfully and feloniously did take, steal and carry away twenty-five turkeys, etc." The evidence showed that defendants killed several of the turkeys by throwing stones at them and after killing them the turkeys were collected into piles, but were not removed and there was no claim that the defendants made any use of the trukeys. *Held*, that the defendants were not guilty of larceny. State v. Rhea, 666.

2. **Same.** In order to constitute the crime of larceny it is necessary that the goods be taken with the intent not only to deprive the owner of the use thereof, but to convert them to the use or benefit of the defendant. Ib.

3. **Same: Killing Animals.** The mere unlawful killing of animals is not larceny in this state. Ib.

LEVEE DISTRICTS. See Evidence, 7.

1. **Status.** A levee district is a public corporation, and its directors are quasi-public officers. Watts v. Levee District, 263.

2. **Estoppel.** Whether an estoppel can be invoked against a levee district, arising from acts of its officers, is a serious question; and, in any event, an estoppel should not be adjudged except on clear and unmistakable proof of acts done by the officers within the line of their powers and duties. Ib.

3. **Powers of Directors.** The directors of a levee district have no power to impose an obligation on the district, unless first authorized to do so by a vote of the landowners of the district. Ib.

Digitized by Google

LEVEE DISTRICTS—Continued.

4. **Payment for Unauthorized Services.** The spirit of our law, as gathered from section 48, article 4 of the Constitution, is against the allowance or payment for public work, or services or labor of any kind performed for a public corporation, such as a levee district, which is done in the first instance without authority of law. Watts v. Levee District, 263.

5. **Unauthorized Warrants: Ratification.** In an action on warrants issued by a levee district to pay for a levee, the proceedings for the construction of which had been held invalid by the Supreme Court because authorized at a meeting of a part only of the landowners of the district, evidence *held* not to show a ratification of the issuance of such warrants by the authorization, at a subsequent meeting of the landowners of the entire district, of the construction of a new levee and the repair of the one in question. Ib.

6. **Same: Payment from Subsequent Levy.** Warrants drawn in payment for unauthorized work performed in constructing a levee cannot be paid out of funds realized from a tax levy subsequently made to pay for the construction of a new levee and the repair of the old one. Ib.

7. **Same: Liability of District: Effect of Prior Decision.** A decision by the Supreme Court, in a suit by a county collector to enforce a levee assessment, that the assessment was invalid because the levee was not authorized at a meeting of the landowners of the entire district and the cost thereof assessed against all the land in the district, conclusively establishes that the holder of warrants issued to the contractors, for the payment of which the assessment adjudged to be invalid was made, may not recover against the levee district, in an action on such warrant. Ib.

LIBEL. See **Witnesses, 4.**

LICENSES. See **Dramshops; Municipal Corporations, 2, 3, 6, 8, 9, 10.**

LIENS. See **Landlord and Tenant, 2; Mechanics' Liens; Special Taxbills.**

LIFE INSURANCE. See **Fraternal Beneficiary Associations.**

LOAN AGENTS.

**Principal and Agent: Loan Agent: Incurring Expenses.** In an action by a loan agent to recover a commission and the cost of the abstract and the expenses incurred in perfecting defendant's title to the real estate, which was to secure the loan, the making of the application for the loan by the defendant and agreeing therein to pay for the abstract and expenses in perfecting the title were admitted. It was further admitted that the defendant refused after the abstract had been made and the other expenses incurred, to complete the transaction. *Held*, that the verdict of the jury in favor of the defendant was against all the evidence and the instruction of the court so far as the same related to the items for cost of the abstract and the court should have set the same aside. Carroll v. Lemmons, 655.

Digitized by Google

MALICIOUS MISCHIEF. See Larceny.

MALICIOUS PROSECUTION. See Witnesses, 4.

MANDAMUS. See Injunctions, 1; Municipal Corporations, 6; Schools, 1.

MASTER AND SERVANT. See Mines and Mining, 1, 2, 3; Railroads, 1, 4, 5, 6, 10, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29; Telegraphs and Telephones, 1, 2.

1. **Master and Servant: Injuries to Truckman.** Plaintiff, a truckman, sued for damages for injuries received while assisting in loading a switch frog, weighing 2000 pounds, into a freight car. The work was done under the supervision of a foreman. It is *held* that the evidence supported the action of the trial court in sending the case to the jury. Smart v. R. R., 61.

2. **Same: Assumed Risks.** The inferiority of the servant's position compels him to rely upon the judgment of the master in respect to those dangers and risks that are not inherent to the service and which the servant, while acting within the bounds of his duty to his master, cannot avoid by the exercise of reasonable care. Ib.

3. **Warning: Experience: Machinery.** A grown man, in possession of his mental facilities, though inexperienced, is not entitled to a warning from his employer that revolving knives, in clear view in a planing machine, will cut him if he puts his hands too near them. Maupin v. Miller, 149.

4. **Planing Mill: Revolving Knives: Contributory Negligence.** Where a man fifty years of age, with but a few days' experience in working a planing machine, is engaged in planing lumber by running boards between two rollers whereby they are conveyed to revolving planing knives, on the stopping of one of the boards, goes around to the side of the machine and puts his hand in near the knives to push the board along, and is cut in the hand, he is guilty of contributory negligence which will bar a recovery for the injury. Ib.

5. **Safe Place to Work: Continuous Duty.** The duty of the master to furnish the servant a reasonably safe place in which to work is not discharged by furnishing such place at the beginning of the servant's work, but the master is required to use ordinary care to see that the place continues in a reasonably safe condition, the duty being a continuous one and non-delegable. Hegberg, Admr. v. R. R., 514.

6. **Negligence: Duty to Install Appliance to Prevent Accidents.** In all occupations attended with great and unusual danger the master must use all appliances readily obtainable which are known for the prevention of accidents and the neglect to provide such readily obtainable appliances is proof of negligence. Ridenour v. Mines Co., 576.

7. **Servant Violating Rules: Master's Acquiescence in Violation.** A servant cannot recover for injuries in consequence of the violation of the master's instructions or rules, unless it be shown that the rules were being violated with the knowledge and acquiescence of the master. Johnson v. R. R., 600.

Digitized by Google

MASTER AND SERVANT—Continued.

8. **Servant Selecting Dangerous Method.** An employee cannot hold the master for damages because he was injured while voluntarily doing an act which he knew was dangerous when at the same time a safe way was open and apparent to him. Johnson v. R. R., 600.

MECHANICS' LIENS. See Injunctions, 4.

1. **Breach of Contract: Measure of Damages.** Plaintiff, a subcontractor, sued to enforce a mechanic's lien for plastering. The work was not done according to the contract. The owner rented the building and did not remove the plaster or have it done as required by the contract. He was allowed damages to the extent of the reasonable cost of removing the defective work and replacing it with plaster that would conform to the contract. *Held*, that if the owner is willing to continue in the use of the defective work, that is this privilege, but he should not thereby be compelled to forego the right to reasonable compensation for the breach. Walter v. Huggins, 69.

2. **Contractor: Personal Judgment.** In a suit against the contractor and landowner on a mechanic's lien claim, there may be a personal judgment rendered against the contractor notwithstanding no lien is established. Clark Williams Realty Co. v. Briggs, 104.

3. **Same: Jurisdiction of Justice: Different Amounts: Judgment.** Where the jurisdiction of a justice of the peace is limited to a sum not exceeding $250, in an action for the enforcement of a mechanic's lien, and to a sum not exceeding $300 in personal actions, and an action was brought against the contractor and landowner for a personal judgment against the former for $265 and to enforce a lien for that sum: It was *held*, that though there was no jurisdiction over the lien, yet as the sum claimed was less than $300, a personal judgment could rightfully be rendered against the contractor. Ib.

4. **Same: Judgment: Appeal: Void Lien: Dismissal.** In an action brought before a justice of the peace against a contractor and a landowner, for a personal judgment against the former and for enforcement of a mechanic's lien against the property of the latter, the sum sought was greater than the justice's jurisdiction for the enforcement of a lien, but within his jurisdiction for a personal judgment. The justice rendered a personal judgment against the contractor and also for an enforcement of the lien. The contractor appealed to the circuit court, but the landowner did not. *Held*, that that part of the judgment before the justice enforcing the lien was void; but that a personal judgment could be rendered against the contractor by the circuit court, and that it was error to sustain the contractor's motion to dismiss the case. Ib.

5. **Releasing Right to Lien: Setting Aside Lien.** In an action in equity to set aside and cancel a mechanic's lien judgment obtained by the defendants against the improvements which had become a part of plaintiff's real estate, the judgment having been obtained against plaintiff's tenant, it appeared that plaintiff claimed title through the foreclosure of a mortgage given by the tenant, the mortgage having been given to secure a loan. It also appeared that the defendants had furnished the plaintiff with a statement of their account against the tenant and

Digitized by Google

MECHANICS' LIENS—Continued.

agreed that if plaintiff would make the loan, a part of which was to satisfy defendants' claim, that defendants would accept two promissory notes in addition to the cash payment in full satisfaction of the indebtedness and claim against the property. *Held*, that under the evidence the defendants had released their right to the lien when the loan was made by the plaintiff under the agreement with them, and the plaintiff not having been made a party to the lien judgment would not be effected by it and the trial court property set the same aside, so far as it affected plaintiff's rights. Mining Co. v. Coyne, 492.

6. **Release: Reviving Lien.** A party entitled to a mechanic's lien may waive, discharge or release the same and having done so for a proper consideration, he cannot afterwards revive the lien. Ib.

7. **Filing True Account: Giving Proper Credits.** The law granting liens to mechanics and materialmen requires that they shall file a just and true account of the demands due them after all just credits have been given, and unless the account is correct and the proper credits have been given, in compliance with the statute, a party cannot enforce his lien upon the property of the owner of the building; but the rights of the lienor are not lost where he unintentionally fails to enter in his account the full amount of the credits to which his debtor is entitled. Ib.

8. **Extraordinary Remedy: Complying with Statute.** The enforcement of a mechanic's lien is a special and extraordinary remedy or privilege given by the law, and one atempting to avail himself of the advantage of such lien must fully comply with the provisions of the law conferring it. Ib.

9. **Parties Defendant: Interested Parties Not Bound, When.** Where a person interested in property sought to be charged with a mechanic's lien is not made a party to the proceedings, he is not bound by the judgment. Ib.

MERCHANTS' EXCHANGE. See **Board of Trade.**

MINES AND MINING.

1. **Master and Servant: Safe Place to Work: Protection from Falling Rock: Negligence: Sufficiency of Evidence.** In an action against a mining company on account of the alleged negligent killing of a servant, who while working as a tub hooker at the bottom of shaft was struck by a heavy boulder which fell from an ore can as the same was being hoisted to the top, the evidence on the part of plaintiff tended to show that the injury could have been avoided by a continuance of the shaft through the open space, so that the ascending cans would be guided thereby; that rocks from the cans would be less liable to fall or would fall straight down through the shaft and not upon any one standing away from the shaft. There was also evidence that a snow shed might have been built at the bottom of the shaft to protect the deceased from falling rock. Defendant's evidence tended to show that it would not have been practical to continue the shaft to the bottom or to have built the snow shed on account of blasting in the mine. *Held*, that the evidence was sufficient to show a causal connection between the acts of negligence complained of and the injury to the deceased and that the judgment for plaintiff should be sustained. Ridenour v. Mines Co., 576.

Digitized by Google

MINES AND MINING—Continued.

2. **Same: Pleading: Protection from Falling Rock: Sufficiency of Petition.** In an action against a mining company on account of the death of plaintiff's decedent, who was struck by a rock falling from an ore can while he was working at the bottom of the shaft as tub hooker, the allegations in the petition relating to the negligent failure of the defendant to continue the shaft from the roof of the mine to the bottom and its failure to erect a snow shed so as to protect the deceased from falling rocks are examined and *held* sufficient allegations of negligence. Ridenour v. Mines Co., 576.

3. **Same: Evidence: Identity of Conditions.** In an action against a mining company on account of the alleged negligent killing of a servant while at work in a mine, an objection was made to a hypothetical question on the grounds that it did not show that the condition in the mines concerning which the expert was called upon to testify were the same conditions which existed in the defendant's mine. *Held*, that identity of conditions was not required in such cases and the hypothetical question propounded was proper. Ib.

MINORS. See **Negligence, 10, 11.**

MONEY HAD AND RECEIVED. See **Executors and Administrators, 1.**

MORTGAGES AND DEEDS OF TRUST. See **Chattel Mortgages.**

1. **Reformation of Deed: Fraud: Sufficiency of Evidence.** In an action by the *cestui que trust* in a deed of trust to reform the deed by striking out a clause, providing that if the secured note was not paid before the death of the payee the debt would be cancelled, on the ground said clause was inserted through the fraud and undue influence of the grantors, evidence *held* to support a finding that said clause was not inserted through the fraud or undue influence of the grantors. Detoul v. Yeater, 245.

2. **Same: Appellate Practice: Moot Questions.** Where, in an action by the *cestui que trust* in a deed of trust to reform the deed by striking out a clause, alleged to have been fraudulently inserted, providing that if the secured note, which was payable nine years after date, should not be paid before the death of the payee, the debt would be canceled, the trial court found that said clause was not fraudulently inserted, the appellate court will not consider what effect said clause has on the note, since that question could arise only in the event the *cestui que trust* died before the note matured. Ib.

MUNICIPAL CORPORATIONS. See **Arrest; Injunctions, 3; Levee Districts; Nuisances, 2; Special Taxbills; Streets.**

1. **Nuisance on Street: Liability of City.** Where city suffers a nuisance to be erected in a public street and does not abate it within a reasonable time after it has knowledge of its existence, it becomes liable for injurious consequences to the same extent as though it had created the nuisance. Roth v. City, 26.

2. **Plumbers: License: Right to Tax.** A city charter did not name plumbing as a business or vocation which might be taxed, and it was held that an ordinance requiring plumbers to pay a license of $25 for the revenue fund, was invalid. City of Fulton v. Craighead, 90.

Digitized by Google

MUNICIPAL CORPORATIONS—Continued.

3. **Same: Business: Shop.** An ordinance which requires a license tax for plumbers in doing any work connected with sewers and house connections therewith, is essentially a tax on his business if conducted outside of his shop. Ib.

4. **City Prosecution: Arraignment: Civil Action.** In a prosecution for violating a city ordinance, in the sale of liquor, a conviction will not be invalidated because the defendant was not arraigned and a plea of not guilty entered. In that respect the prosecution bears resemblance to a civil action. City of Columbia v. Samuels, 92.

5. **Police Officers: Liability for Misconduct.** Police officers may be prosecuted criminally for an unwarranted abuse of authority, under certain circumstances, and may be required to answer at law for civil damages in other cases. Kearney v. Laird, 406.

6. **Dramshop License: Increasing License.** In a mandamus proceeding against a city of the fourth class to compel the issuance of a dramshop license to the relator, it appeared that the county court had renewed the relator's license for six months, but before the relator presented his application to the board of aldermen for a renewal of his license the board passed an ordinance increasing the dramshop licenses from $500 to $750, for each six months. The relator claims he was entitled to his license upon the payment of $500 and that the ordinance is in conduct with the state law because it requires the payment of a tax in excess of the amount the statute allows the county court to assess for a license. *Held*, that the city has a right to increase the license fee and could require the relator to pay the $750 as provided by the ordinance before issuing him a license. State ex rel. v. Long, 658.

7. **Ordinances: Prescribing Heavier Penalties than State Law.** The mere fact that a municipal ordinance prescribes a heavier penalty than the state law for the same offense does not render the ordinance void as being inconsistent with the general law of the state. Ib.

8. **Same: Dramshop License.** The statute gives the right to the county court to fix the amount of dramshop license for state and county purposes and the board of aldermen of cities of the fourth class is given the right to fix the amount in such city. They are not inconsistent provisions, although the amount the county court may assess is limited by the statute and the board of aldermen is not controlled by the limit placed upon the county court. Ib.

9. **Dramshop License: Amount Must Be Reasonable.** Although the board of aldermen of a city of the fourth class in fixing the amount to be paid for dramshop licenses is not limited to the amount the county court may charge for such license, yet if the board of aldermen were to assess an exorbitant sum the ordinance would be unreasonable and therefore void. Ib.

10. **Same: Statute Construed.** The Legislature did not intend that section 7225, Revised Statutes 1909, should in any manner regulate the granting of dramshop licenses by municipalities, as their right and power already existed under their charters. Ib.

Digitized by Google

NEGLIGENCE. See **Carriers of Passengers, 1, 2; Death by Wrongful Act; Landlord and Tenant, 3, 4, 5; Master and Servant; Mines and Mining; Municipal Corporations, 1; Railroads, 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32; Street Railways; Streets 1, 2, 3; Telegraphs and Telephones, 1, 2, 3; Trial Practice, 5, 7, 12.**

1. **Pleading: Specific Acts.** Where specific acts of negligence are alleged, the burden of proof is upon the pleader to show that the injury was caused by the negligence averred and the instructions must restrict the right to recover to the pleaded cause. Gabriel v. Street Ry., 56.

2. **Degree of Care: Instructions.** Where the petition, in a case of a passenger against a common carrier, pleads specific acts of negligence, it is error to direct a verdict for plaintiff on the finding of the jury that the injury was caused by the negligent failure of the defendant to exercise the highest practicable degree of care for the safety of plaintiff. Ib.

3 **Owner of Land: Duty to Trespassers.** The owner of premises owes no duty to protect those from injury who go upon the premises as volunteers, or merely with his express, or tacit permission, from motives of curiosity or private convenience in no way connected with business or other relations with the owner or occupier. Ward v. Kellog, 81.

4. **Same: Pleading.** The facts set forth in the petition fail to state a cause of action, and the trial court properly sustained the demurrer thereto. Ib.

5. **Pleading: Humanitarian Doctrine.** The constitutive facts of a charge of negligence under the humanitarian rule are that the injured person was in a situation of peril; that the operators of the engine or car had actual or constructive knowledge of such peril in time, by the exercise of reasonable care, to avert the injury and that the injury was the result of their failure to exercise such care. Wilder v. R. R., 114.

6. **Pleading: Specific Acts.** Where specific acts of negligence are averred, recovery can be had on no other grounds. Ib.

7. **Questions of Law or Fact.** What is negligence in a given case is a matter of law, but the determination of the facts constituting negligence or due diligence are for the jury. Butts v. Gaar-Scott & Co., 307.

8. **Injuries to Railroad Engineer: Vehicle Obstructing Track: Liability of Owner.** In an action by a railroad locomotive engineer against the owner of a grain separator for injuries sustained by reason of a collision between the separator, which was stuck on the track at a crossing, and the locomotive, evidence *held* to present a question for the jury whether reasonable diligence was exercised by defendant to remove the separator from the track or to warn approaching trains of the obstruction. Ib.

9. **Contributory Negligence: Emergency Acts.** Where a person, when confronted with a sudden peril, chooses what appears to him, in his fright and confusion, to be a means of safety, he is not guilty of contributory negligence as a matter of law because the means adopted turns out to be disastrous for him. Ib.

Digitized by Google

NEGLIGENCE—Continued.

10. **Contributory Negligence: Four-Year-Old Child.** A four-year-old child, who swung his body through a third-story porch banister, while holding to the rail, and thus met his death by falling to the ground, was not guilty of contributory negligence as a matter of law. Karp v. Barton, 389.

11. **Same: Negligence of Parent.** In an action under the Damage Act by the father of a four-year-old child, who swung his body through a third-story porch banister, while holding to the rail, and thus met his death by falling to the ground, *held*, there was nothing in the case suggesting such contributory negligence on the part of the father as would preclude his right of recovery as a matter of law. Ib.

12. **Time of Negligent Act: Proximate Cause.** Under the general rule of actionable negligence while the injuries may not immediately follow the negligent act, it must appear that the injuries were the natural and proximate consequence of the negligence and might and ought to have been foreseen by a reasonably prudent man in the light of all the attendant circumstances. Hegberg, Admr. v. R. R., 514.

13. **Evidence: Subsequent Repairs.** Testimony of subsequent repairs is not admissible to show negligence at the time of the injury. Johnson v. R. R., 600.

14. **Prima Facie Case: Contributory Negligence: Uncontradicted Evidence.** In an action for damages on account of negligence, where plaintiff has made a prima facie case and under its plea of contributory negligence, the defendant has introduced testimony which is uncontradicted and unimpeached and which if true would be sufficient to overcome the prima facie case of plaintiff, yet in such case it is not the province of the trial court to direct a verdict in favor of the defendant, for the question of contributory negligence and the credibility of the witnesses are for the jury. The exception to this rule is where plaintiff's own testimony or the uncontradicted evidence of his witnesses affirmatively shows that he was guilty of contributory negligence. Davidson v. R. R., 701.

15. **Contributory Negligence: Sudden Danger: Degree of Care.** When a person is suddenly and without his own fault placed in a place of danger, he is not required to exercise the same degree of thoughtfulness that he is under other circumstances. Ib.

NEGOTIABLE INSTRUMENTS. See **Bills and Notes.**

NEW TRIAL. See **Appellate Practice, 1, 2; Divorce, 1; Loan Agents, 1; Railroads, 10.**

1. **Weight of Evidence: Discretion.** When a new trial is granted on the ground that the verdict is against the weight of the evidence, if there is any evidence of substance in favor of the party against whom the verdict was rendered, the discretion of the trial court will not be disturbed by an appellate court. Bank v. McCrory, 144.

2. **Same: Promissory Notes: Indorsee: Circumstances.** Where a payor and payee of promissory notes lived a long distance



Digitized by Google

NEW TRIAL—Continued.

apart, and the payor by agreement paid the notes by substituting notes of third parties, but they were not returned to the payor when paid, and an indorsee living in another state claimed to be the owner for value before due and without notice. *Held*, that the circumstances of the payor living a distance from the party claiming to be the innocent holder, and that the indorsee did not notify him of being the indorsee for near six months after they were due, and then of only one of them, were sufficient to uphold the discretion of the trial court in granting a new trial. Bank v. McCrory, 144.

3. **No Reason Assigned: Review: Appellate Practice.** On appeal from an order sustaining, without assignment of reason, a motion for a new trial, one of the grounds of which was that the verdict was against the weight of the evidence, the court will examine the whole record to see whether the state of the evidence authorized such action. Campbell, Admr. v. Hayden, 252.

4. **Verdict Against Weight of Evidence: Review: Appellate Practice.** Where there is evidence authorizing a verdict either way, depending on the credit given witnesses, the granting of a new trial on the ground that the verdict is contrary to the weight of the evidence is a discretionary matter, and will not be disturbed on appeal. Ib.

5. **Sympathy, Passion and Prejudice of Jury: Review: Appellate Practice.** By reason of the better position of the trial court to determine whether or not a jury was swayed by sympathy, passion or prejudice, its action in sustaining a motion for a new trial on one of these grounds will not be disturbed on appeal. Ib.

6. **Verdict Against Weight of Evidence: Review of Order: Appellate Practice.** An order granting a new trial on the ground the verdict is against the weight of the evidence may be reviewed and reversed, where there is no conflict in the testimony on the true issue and no substantial evidence in the record to support a verdict for the party awarded the new trial. Bush v. R. R., 420.

7. **Same: Railroads.** In an action against a railroad company and its engineer for the death of the driver of a team, caused by the team's becoming frightened at steam escaping from the cylinder cocks of an engine and the sounding of the whistle thereon, the evidence tended to show that the engineer was in such a position that he was unable to see the team before letting off the steam or blowing the whistle, but that the fireman was in such a position that he could have observed the approach of the team, not more than thirty feet distant from the engine, and could have communicated that fact to the engineer before the cylinder cocks were opened or the whistle was sounded. A verdict was returned in favor of the engineer and against the company, which was set aside, on the company's motion, as being against the weight of the evidence. *Held*, that, in view of the fact that the fault of the fireman was shown and no effort was made to deny it, the act of the court in granting a new trial was an abuse of discretion, and hence it should be reversed. Ib.

8. **Granting New Trial: Excessive Verdict.** In an action for personal injuries to plaintiff's hand, resulting from falling on a

Digitized by Google

NEW TRIAL—Continued.

defective street crossing, the trial court set aside a verdict of $2500 on the ground that it was excessive. On the trial the plaintiff exhibited his hand to the trial judge. *Held*, that the trial judge had a much better opportunity to observe the extent of plaintiff's injury than did the appellate court, which had only the language of the witnesses describing the injury and that the judgment of the trial court in setting aside the verdict would not be disturbed. Hopkins v. Springfield, 682.

9. **Same: Discretion of Trial Court: Appeal and Error.** The order of the trial court, granting a new trial, will not be disturbed unless it is made clear from all the circumstances of the case that manifest injustice has been done or that the discretion of the trial court has been abused, and a stronger case should be made to justify the interposition of the appellate court when a new trial has been granted, than when it is refused. Ib.

NOTICE.

1. **Burden of Proof.** The defense of a failure to give notice is an affirmative one and the burden is therefore ordinarily on the defendant. Covell v. Western Union, 630.

2. **Mailing Addressed Letter: Presumption.** The fact that a letter was sent duly addressed and stamped, is evidence that it was received by the addressee. Ib.

3. **Same: Street Address: Presumption: Telegraph Companies.** Although ordinarily where a letter is sent to a person in a large city in order to raise the presumption that the letter was received, by showing that it was sent duly addressed and stamped, it should also be shown that the address contained the street and number where the addressee resided, yet where the location of the person or firm addressed is well known in the city, as would be the Western Union Telegraph Company, it is not essential to prove that the letter contained the street and number of the addressee. Ib.

NUISANCES. See **Municipal Corporations, 1.**

1. **Public Nuisance: Damages: Stagnant Water.** A landowner has no right to collect surface water on his land and precipitate it in a body on the land of his neighbor, nor to collect and hold it in a stagnant, offensive and disease-breeding body and thereby inflict an injury to his neighbor. Roth v. City of St. Joseph, 26.

2. **Same: On Public Street: Liability of City.** Where a city suffers a nuisance to be erected in a public street and does not abate it within a reasonable time after the reception of knowledge of its existence, it becomes liable for the injurious consequences to the same extent as it would had it created the nuisance. Ib.

OFFICERS. See **Arrest; Injunctions, 1, 2, 3; Levee Districts, 1; Municipal Corporations, 5.**

OFF-SETS. See **Counterclaims.**

OPTIONS. See **Gambling Contracts.**

Digitized by Google

ORDINANCES. See Municipal Corporations, 7.

PARENT AND CHILD. See Adoption.

PARTIES. See Mechanics' Liens, 9.

PAYMENT. See Tender.

**Debtor and Creditor: Payment: Burden of Proof: Instructions.** In an action on account against the estate of a deceased person for taking care of and boarding the deceased where one of the defenses to the allowance of the claim is that of payment, the jury should be instructed that as to such defense the burden is upon the defendant and that unless he has shown by a preponderance of the evidence such payment the jury will find the issue as to payment for the plaintiff. The instruction given in this case is criticised as being misleading. Cole v. Waters, 567.

PERSONAL INJURIES. See Carriers of Passengers, 1, 2; Damages, 1; Death by Wrongful Act; Evidence, 8, 9; Instructions, 1, 2; Landlord and Tenant, 3, 4, 5; Master and Servant; Mines and Mining; Municipal Corporations, 1; Negligence; Railroads; Street Railways; Streets, 2; Telegraphs and Telephones, 2.

PHOTOGRAPHS. See Evidence, 18, 19.

PHYSICAL FACTS. See Evidence, 18, 19, 20.

PLEADING. See Appellate Practice, 2, 3; Assault, 1; Carriers of Passengers, 1, 2; Contracts, 3; Corporations, 2, 5; Counterclaims, 1; Damages, 1; Death by Wrongful Act, 1, 6, 7, 13; Estoppel, 2; Fire Insurance, 8, 15; Fraud and Deceit, 1, 3; Justices' Courts, 1; Mines and Mining, 2; Negligence, 1, 2, 4, 5, 6; Notice, 1; Trial Practice, 9.

1. **Contract: Filing Contract.** Where the allegations of the petition contain all of the constitutive elements of a cause for breach of warranty and an essential ingredient of a cause for false and fraudulent representations is missing, the action is for breach of warranty, and the contract, constituting the foundation of the action, or a sworn copy, must be filed with the pleading. Hess v. Mfg. Co., 153.

2. **Failure to File Reply.** The law is well settled in this state that after trial and verdict, without any objection that a reply had not been filed and when the trial has been conducted as though a reply had been filed, no advantage can be taken of such omission and the failure to reply will be considered waived. Sharp v. Ins. Co., 475.

3. **Failure to State Cause of Action: Always Open to Review.** A petition that does not state a cause of action is always open for review at every stage of the case, at any time, in any court, whether raised by demurrer or not. Hegberg, Admr. v. R. R., 514.

4. **Words and Phrases: "Unmarried."** An allegation in a pleading that a person is single and unmarried does not necessarily mean that such person was never married but ordinarily and

Digitized by Google

PLEADING—Continued.

especially after verdict the word "unmarried" would properly be *held* to mean that the party had never been married. Hegberg, Admr. v. R. R., 514.

5. **Practice: Sufficiency of Petition: Objection to Evidence.** While the defendant has the right to object to the introduction of testimony on the ground that the petition does not state facts sufficient to constitute a cause of action this practice is one which is to be discouraged and if the petition is sufficient to sustain a judgment the objection should be overruled. Schneider v. Johnson, 639.

6. **Sufficiency of Petition: When to Object.** Where a petition is fatally defective the objection thereto may be made for the first time after judgment or even in the appellate court. Ib.

7. **Exhibits.** Exhibits are not a part of the petition and cannot be considered in passing on the sufficiency of the petition. Ib.

8. **Actions on Account: Failure to File Account: Introducing Evidence: Failure to Object.** While section 1832, Revised Statutes 1909, provides that if the items of an account be not set forth in or attached to the petition plaintiff shall be precluded from giving evidence thereof, yet unless the defendant objects to the introduction of testimony or asks to have the account filed, he waives his right to afterwards complain. Ib.

POLICE. See **Arrest; Injunctions, 1, 2, 3; Municipal Corporations, 5.**

PRACTICE. See **Appellate Practice; Bills of Exceptions; Burden of Proof; Crimes and Punishments; New Trial; Indictments and Informations; Pleading; Change of Venue.**

PRESUMPTIONS. See **Appellate Practice, 6, 10; Evidence, 11, 16, 17; Notice, 2, 3; Railroads, 13, 16 ,29; Landlord and Tenant, 7; Real Estate, 2; Fixtures, 2.**

PRINCIPAL AND AGENT. See **Loan Agents, 1; Real Estate Brokers.**

PRINCIPAL AND SURETY. See **Bills and Notes, 1.**

PROBATE COURTS. See **Executors and Administrators, 2, 3, 4.**

PROCESS. See **Judgments, 3.**

1. **Non-Resident Defendant: Served While Attending Court in Another Action.** A non-resident of the state of Missouri, when attending court as a defendant and witness in a cause in obedience to a summons and for the sole purpose of protecting his interest therein and of testifying in his behalf at the trial thereof in an action brought against him by a resident of the state and county wherein the action is pending, can be served with process and compelled to appear and defend in another action by the same party. State ex rel. v. Moore, 649.

2. **Same.** Section 1751, Revised Statutes 1909, governing the service of process on non-residents, makes no exceptions as to a non-resident who is served with process while attending court as a witness or party in another cause, and the courts are not

Digitized by Google

PROCESS—Continued.

authorized to make any exception; following opinion of the Supreme Court in Baisley v. Baisley, 113 Mo. 544. State ex rel. v. Moore, 649.

PROHIBITION.

**Rules of Decision: Possibilities of Decree of Inferior Tribunal.** The court, in an action to prohibit the circuit court from exercising jurisdiction in a suit by a nonresident corporation against domestic and foreign railroad companies who were alleged to own and operate a line of road in a sister state under one system, to compel them to perform a switching contract by which it is alleged they agreed to switch cars on said line for a certain sum, will not anticipate what decree the circuit court may make, and award the writ on the theory that said court must, to enforce its decree, go into the sister state and undertake to operate the road. State ex rel. v. Homer, 334.

PROTHONOTARIES. See **Judgments, 1, 2, 3, 4, 5.**

PROXIMATE CAUSE. See **Mines and Mining, 1; Negligence, 12.**

PUBLIC CORPORATIONS. See **Levee Districts.**

PUBLIC IMPROVEMENTS. See **Special Taxbills.**

PUBLIC OFFICERS. See **Officers.**

QUANTUM MERUIT. See **Mechanics' Liens, 1.**

QUIETING TITLE. See **Injunctions, 4.**

RAILROADS. See **Carriers of Passengers, 1, 2; Damages, 4; Death by Wrongful Act, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15; Negligence, 2, 5, 8; New Trial, 7; Street Railways.**

1. **Injury to Employee Repairing Track: Sufficiency of Evidence.** Three employees were engaged in repair of a railway track by cutting off a part of an iron splice fourteen inches long and four inches wide, with a chisel and maul. Plaintiff held one end of the splice on an iron surface, while one of his companions held the other end with one hand and the chisel with the other, while the remaining man struck with the maul. The man holding the chisel allowed his attention to be drawn from it by looking away and this caused the chisel to become unsteady, which caused the maul to hit it in a glancing way and to be deflected onto plaintiff's hand, cutting off his thumb. It was *held* that plaintiff had a cause of action. Parker v. R. R., 31.

2. **Negligence: Death at Crossing.** Plaintiff sued for damages for the killing of her husband. He was riding a horse on the public road and attempted to cross the railroad track just after an engine, with two freight cars attached, had backed over the crossing and stopped about ten feet beyond. The engine without warning started forward frightening his horse which reared and plunged and threw him on the pilot. He made frantic but unsuccessful effort to save himself, but the engine moved forward a hundred and fifty feet or more, and he was then dragged under the wheels and killed. *Held*, that the evidence was sufficient to take the case to the jury. Wilder v. R. R., 114.

Digitized by Google

RAILROADS—Continued.

3. **Same: Pleading: Humanitarian Doctrine.** The constitutive facts of a charge of negligence under the humanitarian rule are, that the injured party was in a situation of peril; that the operators of the engine or car had actual or constructive knowledge of such peril, in time, by the exercise of reasonable care, to avert the injury, and that the injury was the result of their failure to exercise such care. Ib.

4. **Action for Assault: Instructions: Failure to Submit Authority of Agent Committing Assault: Non-direction.** In an action against a railroad company for an assault committed by an employee, the defects in an instruction, in so far as it specifically failed to set out the duties of the employee and to specifically charge as to what acts it was necessary to find as evidence of the fact that he was an agent of the defendant, charged with the enforcement of its rules in and about the station where the assault was committed, are matters of non-direction, and are not ground for reversal. Hedge v. R. R., 291.

5. **Action for Assault: Liability for Acts of Agent.** An employee of a railroad company, charged with the duty of enforcing the company's rules in and about a station, was a special policeman, but he did not receive any compensation from the municipality for his services and never did any duty as policeman except at the station. The company paid him for services rendered. *Held*, that the company was liable for an assault committed by him on a person coming to the station for the purpose of purchasing a ticket to take a train, and that it could not escape liability on the theory that what the employee did he did as a policeman and not as an employee. Ib.

6. **Same.** An employee of a railroad company inspecting and repairing engines moving through a town was frequently at the depot, and discharged the duties of watchman with knowledge of the local agent and officers of the company. The company paid him for his services. *Held*, that the company was liable for an assault committed by him while discharging the duties of watchman. Ib.

7. **Injuries to Engineer in Crossing Collision: Contributory Negligence: Speed.** Whether it is negligence for a railroad train to approach a country highway crossing at the regular, scheduled speed of about twenty-five miles an hour, there being no reason for apprehending an obstruction, is, in the absence of a statute regulating the speed, a question for the jury; and the burden is on the party asserting it to prove that such speed was excessive. Butts v. Gaar-Scott & Co., 307.

8. **Same: Jumping from Engine.** In an action by a railroad locomotive engineer against the owner of a grain separator for injuries sustained by reason of his jumping from the engine while it was in motion, when a collision between the separator, which was stuck on the track at a crossing, and the locomotive seemed imminent, whether, under these circumstances, it was negligence for him to jump from his engine while it was in motion, *held*, a question for the jury. Ib.

9. **Frightening Teams in Highway: Liability.** While the mere opening of the cylinder cock of a locomotive to permit the escape of accumulated steam and water, and the sounding of

Digitized by Google

RAILROADS—Continued.

its whistle in the usual way, before starting up, after a stop at a station, is not negligence, ordinary care should be taken to first ascertain whether there are teams in the highway close at hand, and, if any are discovered, due care should be taken to prevent injury to persons by the frightening thereof. Bush v. R. R., 420.

10. **Same: Suit Against Railroad and Engineer: Effect of Verdict for Engineer.** In an action against a railroad company and its engineer for the death of the driver of a team, caused by the team's becoming frightened at steam escaping from the cylinder cock of an engine and the sounding of the whistle thereon, even though the engineer was not negligent, by reason of being unable, because of his position, to see the team before letting off the steam or blowing the whistle, yet the fireman, on the side next to the highway, with an unobstructed view, was guilty of negligence, chargeable to the railroad company, in not looking for the team and communicating its presence to the engineer; and hence the trial court erred in granting the railroad company a new trial on the ground that, the jury having found that the engineer was not negligent, there could be no negligence on the part of the railroad company. Ib.

11. **Killing Animals: Failure to Fence: Sufficiency of Evidence.** In an action under the double damage statute for the killing of two of plaintiff's horses, it appeared that the horses were found dead on defendant's right of way and plaintiff's evidence, when fairly considered, and by reasonable inferences therefrom, is *held* sufficient to show that the animals entered upon defendant's right of way through the gap in the wing fence a quarter of a mile south of where they were killed, and at a place where defendant was required to maintain a lawful fence. Lynn v. R. R., 445.

12. **Same: Burden of Proof.** In an action against a railroad company for double damages for killing stock the plaintiff is required to prove either directly or indirectly from physical facts and circumstances that the animals entered the right of way at a place where the statutes require the fences or cattle-guards to be erected and maintained and that the statute had not been complied with. Ib.

13. **Same: Place Animals Entered: Presumptions.** In an action against a railroad company for double damages for killing plaintiff's horses on account of failure to fence, the defendant contended that in the absence of evidence to the contrary the inference is that the horses entered the right of way at a point opposite where they were found dead on the railroad track. In this case the fence opposite where the horses were found dead was a lawful fence, but a quarter of a mile south was an open gap in a wing fence, the only place where the horses could have entered the right of way without jumping a lawful fence. *Held*, that the presumption contended for by defendant could not be applied to the facts in this case, but that the reasonable inference from all the facts and circumstances was that the horses entered the right of way through the gap in the wing fence. Ib.

14. **Escaping Cars: Negligence: Contributory Negligence: Jury Question.** In an action against a railroad company by an administrator for damages for the alleged negligent killing of

Digitized by Google

RAILROADS—Continued.

his intestate, who at the time of his death was a brakeman on a freight train, engaged in switching cars and who was killed on account of a collision caused by freight cars escaping from a side track because they had not been properly blocked and the brakes set, the evidence is examined and *held* that the question of defendant's negligence and deceased's contributory negligence were for the jury and that the court properly overruled defendant's demurrer to the testimony. Hegberg, Admr. v. R. R., 514.

15. **Same: Blocking Cars: Master and Servant: Duty of Master.** A railroad company owes the duty to its servants employed in the handling of trains to use reasonable care to have its cars left on a side track properly blocked and braked, so as to prevent said cars from escaping. Ib.

16. **Same: Presumption: Res Ipsa Loquitur.** Where cars left on a side track get loose and injure a servant in the due performance of his duty, the presumption will be raised that the master did not use reasonable care to hold the cars on the side track and the burden would be upon the master to prove that he performed his duty in this respect. Ib.

17. **Same: Contributory Negligence: Servant Selecting Dangerous Method: Violating Rules of Company.** Plaintiff's decedent was killed on account of cars escaping from a side track and colliding with an engine. The deceased, who was a brakeman and was assisting in uncoupling and switching cars, had jumped on the pilot of the engine at the time of the accident. Defendant contended that deceased was guilty of contributory negligence in having failed to block and brake the cars that escaped, in selecting a dangerous method of uncoupling the cars and in violating the rules of the company by jumping on the pilot of the engine. *Held*, under the evidence that plaintiff's contributory negligence was for the jury and that the instructions given on that question correctly declared the law. Ib.

18. **Master and Servant: Violating Rules: Tacit Consent of Officers: Contributory Negligence.** Although a railroad company had posted rules forbidding the uncoupling of cars by getting on the pilot or between the cars while the uncoupling took place, if the company's officers knew of the violation of the rule and with their tacit consent have allowed the same to be habitually violated, an employee in pursuing the usual method of uncoupling the cars would not be guilty of contributory negligence as a matter of law. Ib.

19. **Instructions: Negligence: Contributory Negligence.** In an action by an administrator to recover damages for the wrongful death of his decedent, who was killed by a collision resulting from the escape of cars that had been stored on a side track, and which were not properly blocked and braked, an instruction is criticised because it confined the duty of fastening the cars to the day of the accident and it further failed to require a finding of negligence of the agents, servants and employees of the defendant, other than the deceased. Ib.

20. **Escaping Cars: Contributory Negligence: Instructions.** In an action for damages on account of the death of plaintiff's decedent, which resulted from a collision caused by the escaping of cars stored on a side track, which had not been properly

Digitized by Google

braked and blocked, *held*, in separate opinion by COX, J., concurred in by GRAY, J., that on the question of contributory negligence the jury should be instructed that if they should find from the evidence that it was the duty of the deceased to see that the cars left standing on the switch had sufficient breaks set to hold them in place while the switching was done and he failed to perform that duty, then plaintiff could not recover. Hegberg, Admr. v. R. R., 514.

21. **Employee Jumping from Moving Train: Defective Platform: Negligence: Contributory Negligence: Jury Question.** Plaintiff, while employed as head brakeman on a freight train, was injured on jumping from the engine to a station platform while the train was in motion, to get a order for the train. The petition alleged that a defective and decayed piece in one of the planks on the platform caused plaintiff to fall. The defendant set up contributory negligence on the part of the plaintiff in jumping from the moving train when he was not required to do so and when the platform was covered with frost which caused him to slip and fall. *Held*, that the question of defendant's negligence and plaintiff's contributory negligence were for the jury and that the court properly overruled defendant's demurrer to the evidence. Johnson v. R. R., 600.

22. **Operating Trains: Safe Place to Work.** The work of trainmen, not only while operating trains over the road but at station yards, is regarded as dangerous, even under the most favorable circumstances, and it is incumbent upon the companies to use reasonable care to make the places where they perform their duties as safe as is consistent with the operation of the roads. Ib.

23. **Employee Jumping from Moving Train: Violating Rules: Jury Question.** In an action against a railroad company for injuries to an employee a brakeman, who was injured while violating printed rules of the company, which prohibited the employee from jumping on or off trains moving at a high rate of speed, there was substantial evidence that the rules had been abrogated and a conflict as to whether the train was going at a high rate of speed. *Held*, the question was for the jury. Ib.

24. **Same: Defective Platforms: Passengers.** When it is considered that the care required should be commensurate with the peril the employee encounters in jumping from moving trains, it may well be said that a platform that was not reasonably safe for a passenger would not be reasonably safe for such employee. Ib.

25. **Same.** Where a railroad company knows that its brakemen, in the performance of their duties, were required to jump on to the station platform from the train, while the latter was in motion, then the condition of its platform is an important factor. The company was bound to know the usual effect of ordinary, natural conditions and to have contemplated that there might at times be frost or ice upon its platform and that on account thereof obstructions or defects in its platform might be more dangerous than at other times. Ib.

26. **Same: Servant Selecting Dangerous Method: Jury Question.** Plaintiff was injured while jumping off a moving train to get a train order, the negligence alleged being a defect in the station

Digitized by Google

RAILROADS—Continued.

platform. The evidence disclosed that it was the duty of the engineer to stop the train in case the train crew failed to get the order and defendant contended that plaintiff selected a dangerous way when a safer one was apparent to him. *Held*, that the question was for the jury. Ib.

27. **Same: Defective Board.** Where plaintiff claims that a board was rotten at the time he was injured, testimony that it was taken up a week afterwards and was rotten at that time was evidence that it was rotten at the time plaintiff was injured. Ib.

28. **Same: Defective Board: Confining Testimony to Defect: Harmless Error.** Where the instructions submitted to the jury the condition of the platform at the very point complained of by the plaintiff, the testimony of a witness, though objectionable for the reason that he did not confine his testimony to the condition of the platform at the point plaintiff was injured, is *held* not to have affected the verdict. Ib.

29. **Instructions: Master and Servant: Servant May Presume Place to Work in Safe Condition.** In an action against a railroad company for injuries to a brakeman, who in alighting from a moving train caught his foot in a defective board on a station platform, an instruction which tells the jury that in the absence of knowledge to the contrary, the plaintiff had the right to presume that the platform at the place where he alighted was in a reasonably safe condition, etc., is held proper. Ib.

60. **Accident at Crossing: Frightening Team: Failure to Give Statutory Signals: Contributory Negligence: Instructions.** While plaintiff was driving a team, hitched to a buggy, on a public highway, the team became frightened at defendant's freight train, ran away and plaintiff was thrown out and injured. The accident happened near a public crossing. The evidence is examined and *held* sufficient to establish a prima facie case on the part of the plaintiff that the proximate cause of the accident was a failure on the part of defendant's servants to give the statutory signals on approaching the crossing; that the burden of proving contributory negligence was on the appellant and the instructions given, when considered as a whole, are *held* non-prejudical to defendant. Davidson v. R. R., 701.

31. **Sufficiency of Evidence.** While plaintiff was driving a team along a public highway and just after passing over a railroad crossing, the team became frightened at a freight train and ran away, threw plaintiff out of the buggy and injured him. In an action for damages plaintiff made a prima facie showing that the proximate cause of his injury was a failure on the part of defendant's servants in charge of the train to give the statutory crossing signals. Defendant pleaded contributory negligence on the part of the plaintiff in failing to look and listen for trains as he approached the crossing. *Held*, that under the evidence this question of contributory negligence was for the jury. GRAY, J., dissents, and holds that under his construction of the testimony there was no conflict between the plaintiff's testimony and that of his witnesses, as well as those of defendant's witnesses; that all agreed that the train was in plain view and could have been seen by the plaintiff at any time after it came within a quarter of a mile of the crossing. Ib.

Digitized by Google

RAILROADS—Continued.

32. **Same: Escaping Steam: Evidence.** In an action against a railroad company for injuries caused by plaintiff being thrown from a buggy on account of his team becoming frightened at defendant's train and running away, the plaintiff alleged a failure on the part of defendant to give the statutory crossing signals and also that, the escape of steam from defendant's engine was unusual. All the testimony relating to the latter issue was withdrawn from the jury by the plaintiff and the defendant asked the court to instruct the jury to disregard all the testimony relating to the escape of steam. *Held*, this testimony was admissible in support of plaintiff's theory, that his team was frightened and that the court did not commit error in refusing defendant's requested instruction. Davidson v. R. R., 701.

RATIFICATION. See **Estoppel, 1; Levee District, 6.**

REAL ESTATE. See **Injunctions, 4; Landlord and Tenant, 6; Negligence, 3, 4, 10, 11.**

1. **Fixtures.** It is an elementary principle of the common law that land includes houses and buildings thereon, and that whatever is affixed to the soil is thereby made a part of it and passes by grant of the land without other designation. Sharp v. Insurance Co., 475.

2. **Same: Trade Fixtures: Landlord and Tenant.** As between landlord and tenant, annexations made by the tenant to the real estate in aid of his trade are, on the grounds of public policy, removable by the tenant, because they are not presumed to have been annexed with the intention of making them permanent additions to the realty, and they continue to be personal property. Ib.

3. **Fixtures: Trade Fixtures: Fire Insurance.** In an action on a fire insurance policy to recover for the destruction of ice plant machinery which was being operated in a building located on a railroad right of way, a portion of which right of way had been leased to the plaintiff, the evidence is examined and *held* not to show that the machinery or buildings were so incorporated with the freehold as to become a permanent part thereof and that, as between landlord and tenant, the reasonable conclusion is that they remained personal property. Ib.

REAL ESTATE BROKERS. See **Loan Agents.**

1. **Commissions: Contracts: Conditions.** In an action for a real estate agent's commission, it is *held* that under the conditions of the contract the plaintiffs were to procure a purchaser for defendant's property at the sum of $5500 or more, and that unless they procured a purchaser who was willing to pay such sum, they were not to receive any compensation for their services. It appeared in evidence that plaintiffs tried to sell the property to one N for $5500, but were unable to do so; that later the defendant, without having interfered with plaintiffs' deal sold the property to N for $4150. *Held*, that plaintiffs were not entitled to recover the commission on this sale. Hughes v. Thurman & Dodd, 454.

Digitized by Google

REAL ESTATE BROKERS—Continued.

2. **Same: Burden of Proof.** Plaintiffs sued upon a contract, alleging that defendant placed the property in question in their hands for sale, agreeing to give them the usual commission allowed real estate brokers for their services for making the sale and alleging performance thereof. *Held*, that before plaintiffs can recover they must prove the contract pleaded and a compliance on their part with the terms thereof, and unless they do there can be no recovery. Ib.

3. **Same: Owner Selling at Less Price.** Where real estate is listed with a broker to sell at a certain price with an agreement that the broker shall have a commission for making a sale and the broker brings about the negotiations between the two, which results in a sale, the broker is entitled to his conmmission, even though the seller changes his price from that given the broker and accepts a smaller amount. Ib.

4. **Same.** When a broker for an agreed commission is employed to sell certain real estate at a fixed price, but does not procure a purchaser at that price and the owner sells it at a less price, the broker is not entitled to receive a commission, though it appears that the purchaser to whom the sale was made had negotiated with the broker. The commission is not earned until the broker sells to a purchaser at a fixed price. Ib.

REAL PROPERTY. See **Real Estate.**

REPLEVIN. See **Res Adjudicata.**

**Right of Possession: Burden of Proof.** To maintain replevin, plaintiff must show a general or special property in himself with respect to the goods sued for. Ross v. May, Stern & Co., 398.

RES ADJUDICATA. See **Evidence, 3; Levee District, 7.**

**Judgments Replevin: Defective Verdict.** Where, in replevin to recover goods, which were delivered to the plaintiff under the writ, the burden was on the plaintiff to show general or special property in himself with respect to the goods, and a general verdict was rendered for the defendant, which was defective as a verdict in replevin for failure to find whether the defendant had the right of property or the right of possession only at the commencement of the suit, and, if either, then to find the value of the property and damages for withholding the same, as required by sections 7779,7780, Revised Statutes 1909, but judgment was rendered on the verdict as rendered, and no appeal was taken therefrom, such judgment constituted a conclusive adjudication between the parties as to the defendant's right of property in the goods, and was, therefore, conclusive of that question in a subsequent action by the defendant in the replevin suit against the plaintiff in that suit, for conversion of the goods. Ross v. May, Stern & Co., 398.

RES IPSA LOQUITUR. See **Railroads, 16.**

REVIVOR. See **Death by Wrongful Act, 1.**

ROADS AND HIGHWAYS. See **Streets.**

Digitized by Google

SALES.

1. **Sale of Chattel: Failure of Consideration: Recovery Back of Purchase Money.** Purchase money paid by a buyer for a chattel may generally be recovered back if there is a total failure of consideration by reason of the goods purchased being wholly worthless. Bank v. Burress, 690.

2. **Same: Knowledge of Vendor.** The general principle is well settled that when the consideration totally fails and nothing passes by the attempted transfer or conveyance, the amount paid may be recovered back and the application of the principle does not depend upon the question whether the failure arose from ignorance of the law or of fact. Ib.

ST. LOUIS, CITY OF. See **Arrest.**

SCHOOLS.

1. **Attending School: Non-Residents: Child Not Supported by Parents.** In a mandamus proceeding against directors of a school district to compel them to permit the relator's grandson to attend the public schools in said district, in which district the relator was a taxpaying citizen, it appeared that the parents of the boy resided outside the district, but that the grandfather had made an arrangement with the boy's father to take the boy to live with him and since then had controlled him, purchased his clothing and furnished him with the necessaries of life, and the boy's parents had contributed nothing to his support. *Held*, that under the fourth clause of section 10785, Revised Statutes 1909, the grandson was entitled to attend school in relator's district. State ex rel. v. Clymer, 671.

2. **Same.** Section 10785, Revised Statutes 1909, is not ambiguous and plainly provides that children, who are unable to pay tuition and whose parents are not contributing to their support, shall have the privilege of attending school in any district in which they may have a permanent or temporary home and it will be noticed that the privilege is granted regardless of the residence or domicile of the parents. Ib.

SERVICE See **Judgments, 3; Process, 1, 2.**

SET-OFFS. See **Counterclaims.**

SETTLEMENT. See **Accord and Satisfaction.**

SIDEWALKS. See **Streets.**

SLANDER AND LIBEL. See **Witnesses, 4.**

SPECIAL TAXBILLS.

1. **Assignment of Invalid Taxbills: Implied Warranty: Recovery of Purchase Money by Assignee.** The defendant, a contractor, had constructed a certain street pavement and received in payment therefor taxbills, which he had assigned to the plaintiff for a valuable consideration. It appeared that the

Digitized by Google

SPECIAL TAXBILLS—Continued.

defendant had personally superintended the street paving work but had failed to comply with his contract in regard to the quantity and quality of the material to be used in the pavement construction, and by reason of such failure the taxbills were declared void. *Held*, that the plaintiff as an innocent purchaser of the taxbills could recover from the defendant the consideration price paid for such bills, on the implied warranty of their validity, and because of the entire failure of consideration for which plaintiff's money was paid. Bank v. Burress, 690.

2. **Same.** When an innocent purchaser of a taxbill and the lien thereof, does not get the lien because it did not exist at the time of its assignment, and was rendered invalid by the wrong of the vendor, he can recover the consideration from the vendor, there being an implied warranty that the thing sold was valid and existing. Ib.

3. **Same: Recovering Back Purchase Money: Fraud: Knowledge of Assignor.** Where special taxbills issued for paving work, had been assigned by the contractor to the plaintiff, and subsequently the taxbills were declared invalid, *held*, in an action to recover back the purchase price paid the contractor, that it was not necessary for plaintiff to show scienter or knowledge that the defendant knew of the invalidity of the taxbills at the time of his assignment of them to plaintiff. Ib.

STATUTE OF FRAUDS.

**Promise to Pay Debt of Another: Original Promise.** Where a corporation in embarrassed circumstances seeks a settlement of its debts by paying a part and one creditor refuses to settle unless the president of the corporation, individually, agrees to pay him the balance, and the president makes the promise, and the creditor thereupon settles and gives up his claim on the corporation, the promise of the president is not a promise to pay the debt of another, but is a promise to pay his own debt, and the Statute of Frauds has no application. Beall v. Board of Trade, 186.

STATUTES. See **Statute of Frauds; Statutes Cited and Construed; Statutory Construction.**

STATUTES CITED AND CONSTRUED.

**Revised Statutes, 1879.**

Section 2121, see page 552.

**Revised Statutes, 1889.**

Section 2009, see pages 653, 654.

**Revised Statutes, 1899.**

Section 101, see page 286.
564, see page 352.
865, see page 224.
1255, see page 171.
2864, see page 547.
2865, see page 547.
6681, see page 287.

Digitized by Google

STATUTES CITED AND CONSTRUED—Continued.

**Revised Statutes, 1909.**

Section 9, see page 437.

105, see page 46.
289, see page 437.
332, see pages 554, 555, 557, 558.
876, see page 192.
891, see page 192.
1671, see page 564.
1807, see page 16.
1832, see page 646.
1844, see page 156.
1853, see page 352.
1866, see page 16.
1890, see page 239.
1944, see page 417.
1945, see page 417.
1970, see page 360.
2022, see page 55, 56.
2025, see page 56.
2028, see page 228, 727.
2029, see page 228.
2030, see page 727.
2082, see page 232.
2083, see page 565.
2121, see page 48.
2122, see page 48.
2294, see page 464.
2335, see page 468.
2380, see page 55.
2381, see page 55.
2799, see page 510.
3006, see page 645.
3140, see page 709.
3145, see pages 447, 450.
3330, see pages 166, 171, 236, 244, 632.
3939, see pages 368, 432, 440, 441, 443, 444.
4733, see page 472, 474.
4748, see page 411.
4749, see page 411.
5001, see page 215.
5245, see page 727.
5292, see page 214.
5425, see pages 47, 48, 547, 548, 549, 550, 551, 552, 553, 554, 556, 557, 558, 566.
5426, see pages 47, 547, 549, 551, 566.
5427, see pages 547, 549, 551, 556, 557, 558.
5438, see page 47.
6374, see page 178.
6413, see page 261.
7020, see page 486.
7021, see page 487.
7030, see page 3, 487.
7109, see page 363.
7182, see page 135.
7199, see page 663.
7206, see page 663.
7207, see page 663.
7213, see page 474.
7221, see pages 471, 473, 474.
7225, see pages 662, 665.
7481, see pages 465, 467.
7482, see page 468.
7483, see page 468.
7567, see page 123.
7580, see page 123.
7644, see pages 464, 466, 467.
7645, see pages 466, 467.
7654, see page 467.
7779, see page 401.
7780, see page 401.
7888, see page 211.
7897, see page 212.
8216, see page 512.
8217, see page 509.
8221, see page 513.
8223, see page 510.
8862, see page 31.
9253, see page 91.
9580, see page 91.
9582, see pages 662, 665.
10785, see page 675.

**Session Acts.**

Laws 1907, p. 252, see page 47.

Laws 1909, p. 396, see pages 368, 432, 440, 441, 443, 444.

Laws 1911, pp. 261, 262, see page 207.

STATUTORY CONSTRUCTION. See **Death by Wrongful Act, 2.**

**Giving Effect to Every Word.** A familiar canon of statutory construction is that every word of the statute, where it can be con-

Digitized by Google

STATUTORY CONSTRUCTION—Continued.

sistently done, is to be given force and effect, especially if they are in harmony with the Legislature's intention as collected from the entire act. Hegberg, Admr. v. R. R., 514.

STOCK AND STOCKHOLDERS. See **Corporations, 2, 3, 4, 5, 6.**

STREET RAILWAYS. See **Carriers of Passengers, 1, 2; Death by Wrongful Act; Negligence, 2, 5, 8; Railroads, 3.**

1. **Injury to Invitee on Car: Sufficiency of Evidence.** Plaintiff, a boy fourteen years old, frequently boarded a street car at the front end and where the vestibule entrance faced towards the other track. To do this he stood between the tracks and signalled for the car to stop. As it slowed down to near a stop, the motorman said to him: "Get on, kid," and as he got one foot on the car step, the car was suddenly started forward with a jerk, throwing him to the pavement, the car wheel running over his leg so that it had to be amputated. It was *held* to be a case for the jury. Fults v. Street Ry., 101.

2. **Same: Instructions: Care and Prudence: "Permit."** Where other instructions clearly define the care and caution necessary in a plaintiff in deciding whether to attempt to board a slowly moving car, it is not reversible error to give an instruction submitting whether the situation was such as to "permit" a cautious person to board the car. Ib.

3. **Personal Injury: Back to Car: Humanitarian Rule.** A person negligently walking down a street railway track with her back to an approaching car, was in plain view of the motorman for a length of time wherein he might have stopped the car. It was *held* she had a cse for the jury under the humanitarian rule. McDonald v. Street Ry., 111.

4. **Pleading: Humanitarian Doctrine.** The constitutive facts of a charge of negligence under the humanitarian rule, are, that the injured party was in a situation of peril; that the operators of the engine or car had actual or constructive knowledge of such peril, in time, by the exercise of reasonable care, to avert the injury, and that the injury was the result of their failure to exercise such care. Wilder v. Railroad, 114.

STREETS. See **Municipal Corporations, 1; Nuisances, 2.**

1. **New Highway: Maintenance of Sidewalks.** Where a new highway is made across another one already in use, the crossing must not only be made with as little injury as possible to the old way, but all structures necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the new way. Zwicky v. R. R., 180.

2. **Duty to Maintain Structure: Question for Jury.** It is *held* in this case that it was the duty of the defendant to maintain the sidewalk in a reasonably safe condition for pedestrians, and whether it was so maintained without a railing was a question for the jury under the evidence. Ib.



Digitized by Google

STREETS—Continued.

3. **Usual Way: Choosing Dangerous Route.** A pedestrian is not bound to depart from the usual way of travel, notwithstanding it may be defective and dangerous, unless the danger is so great that a person of ordinary prudence, in the exercise of ordinary care, would avoid it by choosing some other and safer route. Zwicky v. R. R., 180.

SUBSEQUENT REPAIRS. See **Negligence, 13.**

SURETIES. See **Bills and Notes, 1.**

TAXATION. See **Municipal Corporations, 2, 3.**

TELEGRAPHS AND TELEPHONES. See **Estoppel, 2; Evidence, 17; Notice, 3.**

1. **Telephone: Linemen: Master and Servant.** The relation between telephone companies and their linemen is no different from the ordinary relation between other masters and servants in the same or like situation and circumstances. The rule in some other states not followed in this state. Hulse v. Telephone Co., 126.

2. **Telephone Poles: Dead Wires: Inspection: Foreman.** Where a lineman of experience, in the employ of a telephone company, knows that his foreman has not inspected a pole, and that separate inspectors are not kept by the company, and is directed by the foreman to go alone to another pole while the foreman climbs one by which they are standing, it becomes his duty to inspect the pole for himself. And if on climbing it and cutting out "dead wire," it falls by reason of being rotten at the ground on the inside, though looking fair on the outside, he cannot hold the company liable for his injury. Ib.

3. **Telegraph Companies: Delivery of Messages.** The statute, Sec. 3830, R. S. 1909, requiring a telegraph company to use reasonable diligence to transmit and promptly deliver messages does not make the company an insurer of the delivery of messages, or that it must employ extraordinary care and diligence to find the addresses, but that it must act with reasonable care and promptness. Moore v. Telegraph Co., 165.

4. **Telegraph Companies: Failure to Deliver Message: Action for Penalty: Regulation Requiring Written Presentation of Claim.** In an action against a telegraph company for the penalty provided by section 3330, Revised Statutes 1909, for the nondelivery of mesages, *held*, by REYNOLDS, P. J., that, if the matter were for consideration as an original proposition, he would be inclined to hold that a regulation of the telegraph company, requiring notice in writing of the demand, as preliminary to the right of action for the penalty, is of no force. Paul v. Western Union, 233.

5. **Same: Sufficiency of Evidence.** In an action against a telegraph company for the penalty for nondelivery of messages provided for by section 3330, Revised Statutes 1909, evidence *held* sufficient to authorize a recovery. Ib.

6. **Telegraph Companies: Action for Penalty: Notice: Sufficiency of Notice of Claim.** In an action against a telegraph company to recover the statutory penalty for failure to transmit and deliver a message, the answer set up a failure on the part of the

Digitized by Google

TELEGRAPHS AND TELEPHONES—Continued.

plaintiff to present her claim to the defendant within sixty days, in accordance with the stipulation printed on the back of the blank on which the telegram was written. The evidence is examined and *held* sufficient to show that plaintiff gave the notice as required by the stipulation. Covell v. Western Union, 630.

TENDER. See Accord and Satisfaction, 3; Landlord and Tenant, 1.

Debtor and Creditor: Payment: Tender. Where a debtor before a suit tenders all that he owes and when brought into court keeps his tender good by a deposit with the proper officer, such tender and deposit amount to a payment, although the creditor did not accept it. Humphreys Mercantile Co. v. Walker, 208.

TIME. See Negligence, 12.

TORTS. See Assault; Carriers of Passengers, 1, 2; Death by Wrongful Act; Landlord and Tenant, 3, 4, 5; Master and Servant; Mines and Mining; Municipal Corporations, 1; Negligence; Railroads; Street Railways; Streets, 1, 2, 3; Telegraphs and Telephones, 1, 2, 3, 4, 5.

TRIAL PRACTICE. See Appellate Practice, 7, 8, 9, 10, 11, 12, 15, 16, 18, 19, 31; Burden of Proof; Change of Venue; Depositions; Evidence, 9, 15; Fraud and Deceit, 4; Jury, 1, 2; Loan Agents, 1; Negligence, 14; Pleading, 2, 5, 6, 8; Witnesses, 9.

1. Evidence: Leading Questions: Discretion of Court. A trial judge may exercise a sound discretion in ruling on objections to leading questions and the appellate courts will not interfere with such rulings unless it appears that there was an abuse of discretion. State v. Chinn, 124.

2. Demurrer to Evidence: Waiver. Where defendants puts on evidence after his demurrer to the evidence offered at the close of plaintiff's case is overruled, and again offers a demurrer at the close of the whole case, he waives the first demurrer. Butts v. Gaar-Scott & Co., 307.

3. Credibility of Witnesses: Province of Jury. The credibility of the witnesses and the weight to be given their testimony are questions for the jury. Ib.

4. Misconduct of Counsel: Curing Error. In an action against a street railroad company, plaintiff's counsel, in his opening argument, referred to great corporations, great millionaires, and great things, in connection with his claim for $35,000 damages. On objection, the court said there was no evidence to support such a statement, and directed counsel to keep within the record, stating that he did not know what millionaires had to do with the case, that the statement was highly improper, and the purpose apparent, and directed counsel to proceed. *Held*, that the court's remarks and admonition were sufficient to cure the error. Torreyson v. Rys., 366.

5. Demurrer to Evidence: Jury Question. In considering a demurrer to the evidence, where the evidence is susceptible to two inferences, one consistent with ordinary care and the other tending to show negligence, the question is one of fact for the jury. Hegberg, Admr. v. R. R., 514.

Digitized by Google

TRIAL PRACTICE—Continued.

6. **Same.** A demurrer to the evidence admits every fact of plaintiff's case to be true which the evidence tends to prove. Hegberg, Admr. v. R. R., 514.

7. **Prima Facie Case: Oral Testimony: Jury Question.** Where the plaintiff has the burden of proof and has made out a prima facie case by oral evidence and though plaintiff's witnesses are uncontradicted and defendant offers no evidence at all, the court has no right to direct a verdict but the defendant is entitled to have the jury pass on the credibility of the witnesses. This rule is applied in a case where defendant contended that the oral evidence established the contributory negligence of plaintiff. Ib.

8. **Evidence: Objections: Practice.** A party objecting to testimony is not required to keep up a running fire of objections throughout the entire examination. In this case the defendant's objections are *held* to have been sufficiently well timed and numerous enough to meet all the requirements of the law. Ib.

9. **Pleading: Sufficiency of Petition: Objection to Evidence.** While the defendant had the right to object to the introduction of testimony on the ground that the petition did not state facts sufficient to constitute a cause of action this practice is one which is to be discouraged and if the petition is sufficient to sustain a judgment the objection should be overruled. Schneider v. Johnson, 639.

10. **Jury Question: Uncontradicted Evidence.** In our state the law seems to be well established that when the allegations of a party are denied and an issue thereby raised, and such party has the burden of proof, and the evidence introduced by such party to sustain the issue on his part is oral, the issue of fact should be submitted to the jury, although the evidence is uncontradicted and unimpeached and even though the opposing party has introduced no evidence. Davidson v. R. R., 701.

11. **Jury Question: Uncontradicted Evidence: Witnesses for Both Parties Testifying to Same Fact.** When plaintiff's witnesses testify to a certain fact, and the witnesses for defendant testified to the same fact, and there is no conflict in their testimony, there is no issue of fact to submit to the jury. GRAY, J., in dissenting opinion. Ib.

12. **Same: Contributory Negligence: Shown by Plaintiff's Evidence.** A party by introducing witnesses vouches for their credibility and hence the weight and credibility of such testimony is eliminated from the consideration of the jury and therefore when such party, by the uncontradicted evidence of his own witnesses makes a case for his opponent, the court may give a peremptory instruction based upon that testimony. Ib.

TROVER. See **Conversion.**

USURY.

1. **Loan: Concealed.** A loan is the foundation upon which a charge of usury must rest, and if this element does not appear in the transaction, usury is not in it, no matter what may be the price exacted. The law will get under and expose any disguise in its quest for usury. White v. Anderson, 132.

Digitized by Google

USURY—Continued.

2. **Credit: Guarantor: Indorser.** One may pledge his credit for another by way of guaranty, indorsement or otherwise, and charge what he likes without being guilty of usury, if he has no interest in the loan. Ib.

3. **Loan: Coupon Tickets: Merchandise: Credit.** A party carried on the business of selling coupon ticket books to persons who could not obtain credit at stores, with which any kind of merchandise might be purchased of merchants to whom the books were addressed. The purchaser of the book would give his note, due in thirty days, for the price of the book plus five per cent, with eight per cent interest from maturity. The party issuing the coupon books would settle with the merchants to whom they had been addressed and who had taken them up by furnishing merchandise, by paying to the merchants the amount called for, less ten per cent. It was *held*, that this was not a sale of credit for a rate per cent commission, but was, in reality and effect, a loan to the person purchasing the coupon book, and was usurious. Ib.

VARIANCE. See **Assault; Contracts, 3.**

VENDOR AND PURCHASER. See **Assignments, 2.**

VERDICTS. See **Railroads, 10; Res Adjudicata.**

WAGERING CONTRACTS. See **Gambling Contracts.**

WAIVER. See **Appellate Practice, 32; Fire Insurance, 4, 5; Jury, 1, 2; Mechanics' Liens, 6; Pleading, 8; Trial Practice, 2.**

WARRANTY. See **Pleading, 1; Special Taxbills, 1, 2, 3.**

WATERS AND WATERCOURSES. See **Nuisances, 1.**

WESTERN UNION TELEGRAPH COMPANY. See **Evidence, 17; Notices, 3; Telegraphs and Telephones.**

WITNESSES. See **Crimes and Punishments, 1; Evidence.**

1. **Death of Party: Witnesses: Competency.** A vendor and vendee in consummating the sale of a mine wherein the vendee, who executed and delivered a note for part of the purchase money, agreed with the vendor, as part of the contract, that he would get a surety, not present, to afterwards sign the note, and the surety afterwards did sign it, and then died; it was *held*, that the vendor and vendee, as well as their agents, were competent witnesses in an action brought on the note against the estate, and that their disqualification was not contemplated by the statute on witnesses. Ford v. McClain, 174.

2. **Same: Other Parties: Independent Transactions.** The surviving party to a contract in a suit, or his agent, is not disqualified in all instances in actions against the deceased's estate. They may testify to transactions had with others to which the deceased was not a party, and with which he had no connection and of which he had no knowledge. Ib.

3. **Reputation of Party: Evidence: Appeal and Error.** In an action on contracts the defense was that the contracts had been altered or mutilated by plaintiff after delivery. The only evidence on this issue was that of plaintiff and defendant. The trial court permitted the introduction of the testimony of one of defendant's witnesses in the form of a deposition to the

Digitized by Google

WITNESSES—Continued.

effect that defendant's reputation was good. *Held*, that the error was material and justified reversing the judgment. GRAY, J., dissents and *holds* that the error was not one justifying the reversal of the judgment, especially in view of the provisions of section 2082, Revised Statutes 1909. Hatch v. Bayless, 216.

4. **Same: Relevancy of Party's Character.** In civil cases the character of neither party, until assailed, can be inquired into, unless it is put in issue in that class of cases such as libel, slander and malicious prosecution, when its value may be considered in assessing the amount of damages. Ib.

5. **Attorney and Client: Privileged Communications.** Where a carbon copy of an application for a patent is in the hands of the inventor's attorney, it is privileged and the attorney cannot be compelled to produce it. Leschen v. Brazelle, 415.

6. **Same: Producing Documents Committed to Attorney.** In a suit for specific performance of a contract to convey a half interest in a patent, plaintiff applied for an order requiring defendant (the patentee) to produce the application for the patent. It appearing that the original application was on file in the patent office, the court made an order, under sections 1944 and 1945, Revised Statutes 1909, requiring defendant to produce a copy of the application, for use in the case. This defendant declined to do, because the copy was in the possession of his attorney and not in his own possession, and he objected to the attorney's producing it because it was privileged. The attorney laid no claim to the paper, nor objected to producing it on his own account, but was willing to furnish it to his client on his request. *Held*, that it was not material that the attorney owned the paper on which the copy of the application was written, and, the copy not being privileged in the hands of defendant, it could not be made privileged by defendant's placing it in the possession of his counsel, and hence an order requiring defendant to recall the copy from his counsel and to then produce it was proper. Ib.

7. **Administration: Witness Interested in Estate: Competency.** In an action against an estate of a deceased person on a claim for taking care of the deceased, the brother of deceased was *held* not disqualified as a witness, although he was interested in the estate of the deceased. Cole v. Waters, 567.

8. **———: Interested Party Not Incompetent.** The common law rule that a person having a pecuniary interest directly involved in the matter in issue and on trial is incompetent as a witness, has been abolished absolutely by section 6354, Revised Statutes 1909. Ib.

9. **Impeachment: Specific Delinquencies: Cross-Examination.** Although ordinarily the credibility of a witness cannot be impeached by specific delinquencies, but only by general reputation, yet on cross-examination the witness's credibility may be affected by questions which tend to reflect on his accuracy, veracity and morality and tend to show his depravity. Ridenour v. Mines Mo., 576.

WORDS AND PHRASES. See **Definitions.**

Digitized by Google

# Rules Governing Practice in the Kansas City Court of Appeals.

IT IS ORDERED BY THE COURT THAT THE FOLLOWING RULES OF PRACTICE IN THE KANSAS CITY COURT OF APPEALS SHALL BE IN FORCE AND OBSERVED FROM AND AFTER THE FIRST DAY OF APRIL, 1885:

**RULE 1.—Presiding Judge.** The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

**RULE 2.**—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

**RULE 3.—Hearing of Causes.** No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

**RULE 4.—Taking Records from Clerk's Office.** Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

**RULE 5.—Diminution of Records.** No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

**RULE 6.—Certiorari to Perfect Record.** Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

**RULE 7.—Notices of Writs of Error.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**RULE 8.—Review of Instructions on General Statement of Evidence.** In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied



Digitized by Google

in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

**RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court.** If the opposite party shall contend that there was no evidence tending to prove a fact or issue and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

**RULE 10.—Evidence—Bill of Exceptions to be Allowed, When.** If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

**RULE 11.—Exceptions—Questions to be Embodied in Bill.** When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

**RULE 12.—Duty of Circuit Court Clerks in Making Transcripts.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause,*) in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the ——— day of ———, 188—, executed on the ——— day of ———, 188—;*" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

**RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence.** The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court



Digitized by Google

may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**RULE 14.—Bill of Exceptions in Equity Cases.** In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

**RULE 15.—Abstract and Briefs to be Filed and Served.** In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

**RULE 16.—Citing Authorities in Briefs.** In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or,



Digitized by Google

if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

**RULE 17.—Appellant's Brief to Allege Errors Complained of.** The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

**RULE 18.—Penalty for Failure to Comply with Rule 15.** If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

**RULE 19.—Agreed Statement of the Cause of Action.** Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

**RULE 20.—Motion for Rehearing.** Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

**RULE 21.—Motion for Affirmance.** On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.



Digitized by Google

**RULE 22.—Extending Time for Filing Statements, Abstracts, Etc.** In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

**RULE 23.—Oral Arguments.** When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

**RULE 24.—Notice on Motion to Dismiss or Affirm.** A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

**RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript.** In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time of said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

Digitized by Google

# Rules of Practice in the St. Louis Court of Appeals.

## REVISED JULY 20, 1909.

## TO BE IN FORCE AUGUST 15, 1909.

**Rule 1.—Presiding Judge.** The Presiding Judge shall superintend all matters of order in the Court Room.

**Rule 2.—Words Appellant and Respondent, What They Include.** Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

**Rule 3.—Motions.** All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

**Rule 4.—Hearing of Causes.** Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

**Rule 5.—Diminution of Record.** No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

**Rule 6.—Certiorari to Perfect Record.** Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.



Digitized by Google

**Rule 7.—Notice of Writs of Error.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**Rule 8.—Reviewing Instructions.** For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

**Rule 9.—Bills of Exceptions in Equity Cases.** In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

**Rule 10.—Duty of the Clerk in Making Up Transcripts.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the ——— day of ——— 190—, executed on the ——— day of ———, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

**Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence.** The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served.** In those cases where the appellant shall, under the provisions of section 813, Revised Statutes 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete trans-



Digitized by Google

cript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstracts above referred to and of any objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

**Rule 13.—Printed Transcripts.** A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

**Rule 14.—Abstracts—When Filed and Served.** In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

**Rule 15.—Abstracts, What They Shall Contain.** Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

**Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript.** In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant



Digitized by Google

shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

**Rule 17.—Costs, When Allowed for Printing Abstracts and Records.** Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

**Rule 18.—Briefs, What to Contain and When Served.** The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities



Digitized by Google

appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

**Rule 19.—Citing Authorities in Brief.** In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

Authorities incorrectly cited as to book, page or title of case will be disregarded.

**Rule 20.—Extension of Time.** Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

**Rule 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18.** If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

**Rule 22.—Agreed Statement of Cause of Action.** Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

**Rule 23.—Motions for Rehearing.** Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed



Digitized by Google

by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. See Barnett et al. v. Colonial Hotel B. Co., 119 S. W. 471; 137 Mo. App. 636.

Rule 24 is hereby amended to read as follows:

**Rule 24.—Oral Arguments.** When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

**Rule 25.—Notice on Motion to Dismiss or Affirm.** A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

**Rule 26.—Motion for Affirmance.** On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

**Rule 27.—Appearance of Counsel.** The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

**Rule 28.—Allowance to Garnishees.** Garnishees claiming any allowance in this court must do so on or before a final submission



Digitized by Google

of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

**Rule 29.—Service of Abstracts and Briefs in Criminal Cases.** The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

**Rule 30.—Return of Original Writs.** Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

**Rule 31.—Withdrawing Records.** No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

**Rule 32.—Repeal of Former Rules.** All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

**Rule 33.**—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.



Digitized by Google

# RULES OF PRACTICE.

IN THE

# SPRINGFIELD COURT OF APPEALS

**Adopted August 19, 1909.**

**RULE 1.—Presiding Judge.** The presiding Judge shall superintend all matters of order in the court room.

**RULE 2.—Words Appellant and Respondent, what they include.** Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

**RULE 3.—Motions.** All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

**RULE 4. Hearing of Causes.** Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

**RULE 5.—Diminution of Record.** No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

**RULE 6.—Certiorari to Perfect Record.** Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

**RULE 7.—Notice of Writs of Error.** All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filled with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

**RULE 8.—Reviewing Instructions.** For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to



Digitized by Google

prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

**RULE 9.—Bills of Exceptions in Equity Cases.** In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

**RULE 10.—Duty of the Clerk in Making up Transcripts.** The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 191—, executed on the — day of — 191—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

**RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence.** The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

**RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served.** In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

**RULE 13.—Printed Transcripts.** A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

**RULE 14.—Abstracts, when Filed and Served.** In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to



Digitized by Google

respondent a copy of his abstract of the record at least twenty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

**RULE 15.—Abstracts, What They Shall Contain.** Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just. (Amended January 3, 1911, to take effect February 1, 1911.)

**RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript.** In all cases where appeals shall have been taker or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

**RULE 17.—Costs, when Allowed for Printing Abstracts and Records.** Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause.



Digitized by Google

In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

**RULE 18.—Briefs, what to Contain and when Served.** The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

**RULE. 19.—Citing Authorities in Briefs.** In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

**RULE 20.—Continuing and Resetting Cases.** No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st, 1910.)

**RULE 21—Penalty for Failure to Comply with Rules 12, 14, 15 16 and 18.** If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.



Digitized by Google

**RULE 22.—Agreed Statement or Cause of Action.** Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

**RULE 23.—Motions for Rehearing.** Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

**RULE 24.—Oral Arguments.** When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

**RULE 25.—Notice on Motion to Dismiss or Affirm.** A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

**RULE 26.—Motion for Affirmance.** On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

**RULE 27.—Appearance of Counsel.** The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten



Digitized by Google

days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

**RULE 28.—Allowance to Garnishees.** Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

**RULE 29.—Service of Abstracts and Briefs in Criminal Cases.** The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

**RULE 30.—Return of Original Writs.** Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

**RULE 31.—Withdrawing Records.** No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

Adopted this 19th day of August, 1909.

2193 1522



Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

HARVARD LAW LIBRARY

Digitized by Google

Digitized by Google